Original.

No. 8587 ~~No. 8588.~~

In the Supreme Court

Of the

State of California.

CHARLES LUX ET AL.,
APPELLANTS,

vs.

JAMES B. HAGGIN ET AL.,
RESPONDENTS.

IN BANK.

Brief for Respondent

On Re-Hearing.

Louis T. Haggin,
Attorney for Respondent.

Filed May 25 *A. D. 1885.*

J. W. McCarthy *Clerk.*

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CHARLES LUX ET AL., *Appellants*, vs. J. B. HAGGIN ET AL., *Respondents.*	No. 8587 AND No. 8588.

Brief for Respondent on Re-Hearing in Bank.

December 16th, 1884, your Honors made the following order:

"On the re-argument of this case, the Court is "particularly desirous of hearing counsel on the "following questions:

"1. Did the Court err in sustaining defend- "ant's objections to the introduction of evidence "by the plaintiffs after both parties had once "rested, to prove what was the condition of

"Buena Vista Slough where the 'De Weber "Road' crossed it?

"2. Did the Court err in sustaining defen- "dant's objections to the introduction by the "plaintiffs of the certificates of sale by the State "of the lands claimed by plaintiffs?

"3. Are all the parts found in findings 63, 64, "67, 68 and 69, or in any of them, sufficient to "justify the denial of the equitable relief prayed "by plaintiffs?"

Most of these questions are carefully and fully discussed in the petition for rehearing herein of Messrs. Garber, Thornton & Bishop, pp. 4 to 34; and, without repeating here, we desire respectfully to refer to that petition, and ask its careful consideration. In addition, however, we beg to add the following.

QUESTION ONE.

DID THE COURT ERR IN SUSTAINING DEFENDANT'S OBJECTIONS TO THE INTRODUCTION OF EVIDENCE BY THE PLAINTIFFS AFTER BOTH PARTIES HAD ONCE RESTED, TO PROVE WHAT WAS THE CONDITION OF BUENA VISTA SLOUGH WHERE THE "DE WEBER ROAD" CROSSED IT?

We contend:

1st. The Court did not err.

2d. The error, if any, was immaterial, and did not injure or prejudice plaintiffs.

FIRST.

THE COURT DID NOT ERR.

To properly understand and answer this first question, it is necessary to go back to the trial below and consider plaintiffs' offer and their exceptions noted.

The Record shows the following proceedings:

"By MR. HOUGHTON—Q.—I omitted to ask one question. You say that on last Sunday you were down there again in that locality. Did you then do any other work on that slough or in that swamp land?

A.—Yes, sir.

Q.—What was that?

A.—It was a cross-section from the DeWeber road.

MR. HOUGHTON—What we offer to show by this witness is, that he, with Mr. Smith, the last witness, made a cross-section of this DeWeber road at Buena Vista Slough, at a point where the DeWeber road crosses it, near the place where the old pump was. Certain witnesses of defendant testify as to just what that slough was at that point where that road crosses. We offer to show by this witness that he cross-sectioned that slough at that point, and what the result of that cross-section was.

MR. GARBER—From the instruments?

MR. HOUGHTON—Yes, sir; certainly.

MR. FLOURNOY—We object to that. It is merely a contradiction of our testimony, of a contradiction of theirs.

THE COURT—There were a number of witnesses who testified positively as to there being a slough there. I think there were more witnesses on the part of the plaintiffs testified that there was a slough there than testified that there was not a slough there.

By MR. MCALLISTER—Q.—What kind of a survey did you make there?

A.—We took the elevations and levels across the channel at that point, and took the width and depth of the water.

MR. FLOURNOY—The testimony offered is merely cumulative.

THE COURT—I think the testimony of defendant's witnesses, all of them, upon that point was not uniform, and that the testimony of plaintiffs' witnesses was that there is a slough down there. It appears to me it is just simply cumulative testimony.

MR. HOUGHTON—We make the offer.

THE COURT—I will sustain the objection.

[Plaintiffs except.]

MR. HOUGHTON—And I understand that, without recalling Mr. Smith, we can make the same offer to prove the same fact by him?

THE COURT—Yes, sir; and the same ruling and exception."

Trans. 5, fols. 107, *et seq.*

Again, McCray being on the stand:

"MR. HOUGHTON—Q.—Will you look at this Map D [showing to witness]. There is a road delineated on that map running from a house marked "De Weber"?

A.—Yes, sir; I know where that road runs.

Q.—Do you know where that road strikes Buena Vista Slough?

A.—Yes, sir; I have been at that point. I was at that point about three weeks ago.

Q.—What did you do when you were at that point?

A.—I cross-sectioned the slough at that place.

Q.—How wide and deep did you find that slough at the point where you crossed?

MR. FLOURNOY—The same objection we made yesterday.

THE COURT—The objection is sustained. I thought the counsel understood me yesterday.

[Plaintiffs except.]"

Trans. 5, fols. 141–2.

Now, one of two things is certain; either this proposed testimony of plaintiffs' was offered as rebuttal to some fact established, or assumed to have been established, by defendant, or else it was offered as evidence upon plaintiffs' original case.

If offered as evidence upon plaintiffs' original case, it was of course properly rejected, for, plaintiffs having closed their case in chief, could not again open it without having first asked and for

good reason obtained permission of the Court so to do.

C. C. P. Sec. 607, Sub. 3.
C. C. P. Sec. 2042.

The record shows that no such request was made, cause shown, or permission given.

The proposed testimony, then, must have been offered as matter in rebuttal and not as part of their case in chief. It must also have been offered as a matter of right, for the discretion of the Court was not appealed to. We may therefore dispense with all discussion as to whether or not the Court *could*, in the exercise of a sound discretion, have received the proposed testimony as evidence in rebuttal, and devote ourselves exclusively to the consideration of the question: Was the ruling of the Court, rejecting the evidence offered, a violation of plaintiffs' rights?

We contend that it was not, for—

A.

As remarked by his Honor, Mr. Justice McKinstry, during the oral argument of Mr McAllister:

"The rule as to rebutting evidence is, that when a particular fact is proved to disprove the existence of a general fact which the other side have established, the other side may call rebutting testimony as against that particular fact."

This rule, however, must be taken with certain qualifications, first of which is, that the particular fact so to be rebutted be not a fact the existence of which it was incumbent upon the other side to negative or destroy in their opening case; and, second, that the particular fact sought to be rebutted be not itself a mere negation or denial of the general fact or case made out by plaintiffs.

To make the rule applicable, the particular fact to be rebutted must be rather an extraneous fact—or, if I may term it so, a third fact—the existence of which is incompatible with, and therefore, by inference merely, a contradiction or denial of the condition of facts established by plaintiffs' opening. For instance, in this very case, plaintiffs claiming riparian rights, it was incumbent upon them, and essential to their opening case, to establish, among other things, the existence of a water-course with bed and banks or channel. They introduced evidence, which, if uncontradicted, might have been held proof of a channel. Defendant then met this evidence by proving, not any new or extraneous fact *tending* inferentially to deny plaintiffs' case or merely *incompatible* therewith, but simply that the very fact of channel, sought to be established by plaintiffs, does not exist—a direct contradiction or denial of plaintiffs' case.

Upon his oral argument, Mr. McAllister en-

deavored to impress upon your Honors that it was not incumbent upon plaintiffs in their opening to do more than prove *generally* a certain condition or natural sequence of facts, and that if defendant disproved any one of the essential facts necessary to establish this sequence or condition, then plaintiffs could come in, in rebuttal, and themselves disprove such disproof, or, in other words, deny our denial.

But Mr. McAllister's theory is clearly untenable, for to have established his general condition or sequence of facts he must be held to have established each particular fact necessary or essential to that general condition; and when we deny or disprove any particular one of his essential facts, our disproof is nothing more nor less than a disproof or denial of his general condition of facts.

If Mr. McAllister established *generally*, a continuous channel, he established a continuous channel *because* he introduced testimony in support thereof. The burden of proving the fact was upon him, and unless proved, there could be no presumption of the fact itself. The mode or manner in which he proved it, is absolutely immaterial. He proved it or he did not. If he did not, he failed to make out his case. If he did, as he says he did, then he gave evidence, direct or indirect, which, if uncontradicted, would have justified the Court in finding a continuous chan-

nel. Unless such evidence was given, such fact could not have been found. Now, to constitute a continuous channel, it is necessary that there be a channel at *every point* along its course. If not, then it was not continuous; and as the Court could only have found, from the *evidence*, there must have been evidence of some sort, as to its condition at *every point* of its course. It is no answer to this proposition to say that evidence as to its condition at any particular point was there, but such evidence was merely *general.* If there at all, it was there because Mr. McAllister had introduced it in his opening case, and having gone into such proof, he should have gone into it fully, and exhausted all his evidence thereon. If he did not make it sufficiently strong in his opening, it was his own fault. He introduced such testimony thereon as he then deemed sufficient *to prove the fact.* The fact having been contradicted by our side, he could not, without permission of the Court, for good reason had, come back to fortify his case and say: "I proved a channel at that particular point, it is true, but I find I did not prove it sufficiently strong and, having now got from the other side the full force of their denial, I want to come back at it again, and build up *specifically*, to the very skies, that one little point upon which I only touched *generally.*"

Your Honors must not assume that we are here

contending that it was necessary for plaintiffs to prove a continuous defined channel at every point to support their case of watercourse. We will admit even, for the purposes of this particular branch of our argument, (though we do not admit the proposition generally), that the channel may disappear at certain points, or for some short distance, provided it come in again. But we do contend that plaintiffs, having introduced evidence to show that the channel was continuous, that it did not disappear, and we having proved that it did disappear, could not come back again in rebuttal as mere *matter of right*, and reiterate that it did not. They might have argued to the lower Court—provided they had established all other essential elements of a watercourse — that the mere disappearance of the channel at one or more particular points was not material, and did not destroy their claim of watercourse. It would then have been for the jury or the lower Court to pass upon the facts presented and decide whether or not, all other evidence being considered, this disappearance of the channel did destroy their case. Watercourse was the ultimate fact to be found, and channel but one of the probative facts going to make up such ultimate fact.

Eulrich vs. *Richter*, 37 Wis., 228.

If our proof, that at the De Weber crossing there was no slough or channel, was sufficient to disprove plaintiffs' claim to a watercourse, then it was necessary for plaintiffs, in their opening, to have proved that at that crossing there was a channel. This they either did or did not attempt to do. If they did, then our testimony was but a contradiction of their evidence thereon, and their offered testimony was merely a strengthening of their original case—matter cumulative to their evidence already in and not rebuttal to any new or particular fact established by us. If they did not, then they had omitted a material fact in their opening, and, having closed, could not come back as a matter of right and, under pretense of rebuttal, supply that omission.

If our proof, that at the De Weber crossing there was no slough or channel, was not sufficient to disprove their claim to a watercourse, then, of course, there was nothing for plaintiffs to rebut and their offered evidence was properly rejected.

Again:

Mr. McAllister tells your Honors that by some twenty-three or more witnesses he *proved generally* a continuous channel from Kern River to Tulare Lake. Now, this term "proved generally," is meaningless. The fact is proved, or it is not proved. Plaintiffs either proved a continuous

channel, or they did not prove it. If, in their opening case, they proved a continuous channel—term it proved generally or specifically, what you will—the one, simple, isolated fact—that of channel, and that alone—was established. This fact we had the right to meet in any way we saw fit, either by direct denial of the fact itself, or by indirect evidence contradictory thereof, such, for instance, as showing another condition of facts incompatible with that of the fact already established by plaintiffs. Had we pursued the latter mode plaintiffs might, then, have rebutted any or all the new or particular facts from which the incompatibility thus established, resulted. This, however, we did not do. We adopted the former mode, and directly attacked the facts they had attempted to establish, and there was nothing left for plaintiffs to rebut.

They gave evidence that a certain channel ran through a certain tract of country. Our witnesses, having crossed the particular country described, testified that there was no channel there. What new or particular fact was there in this evidence of ours for them to rebut? Mr. McAllister, endeavoring to throw upon us the burden of proving a negative, ingenuously asked why, if we wished to show that there was no channel, did we not trace its course and give its various widths and depths from the river

to the lake, as they had done. Why? For the simple reason that there was nothing to trace. We did trace it as far as it went, but found that within a very short distance after leaving the mouth of the river, the channel entirely faded away, disappeared, ceased to exist, and therebeyond could not be found or traced any further; and then to make sure that it did not come in again, we traversed the swamp to and fro in various directions, at many different points. It not existing, what possible mode then was there of disproving their fact of continuous channel other than that which we adopted, that of proving by our various witnesses who had traversed the country through which the channel was supposed to run, that there was no channel there—that at the several places where they had crossed there was no sign or trace of a channel, or anything to indicate where water would flow. Had plaintiffs attempted to show that our witnesses had not been in the country or at the particular spot, or even that at some other time they had stated differently, such showing would doubtless have been proper rebuttal; but not so the showing which they offered to make, that at the places where these witnesses testified there was no channel, there was in fact a channel. That was part of their own case, and either was, or should have been made in their opening.

In *Rex* vs. *Hilditch*, 5 Carrington & Payne, 299 ["Indictment for robbery. The case for the prosecution had been closed and the defense of the prisoners was an *alibi*, viz: that they were at a public-house, at a considerable distance from the place at which the robbery was committed. *W. J. Alexander*, for the prosecution, wished to call a witness in reply, to prove that he saw all the prisoners near the spot at which the robbery was committed; and that, therefore, they could not have been at the public-house"], the Court said:

"Proving that the parties were near the place at which the offence was committed is evidence in chief and not evidence in reply. Whatever is a confirmation of the original case cannot be given as evidence in reply; and the only evidence that can be given as evidence in reply, is that which goes to cut down the case on the part of the defence, without being any confirmation of the case on the part of the prosecution."

Again:

To permit of the application of the rule, the particular fact to be rebutted must also be an *affirmative* fact. This proposition is so self-evident that argument thereon seems superfluous. If the particular fact sought to be rebutted be not affirmative, then it must be either a denial of some affirmative fact gone into or established by the other side—in which case, as we have already seen, it is not subject to rebuttal—or it must be a mere conclusion deduced from some affirm-

ative fact or facts established, not a primary fact in itself. It is impossible to conceive of the defense proving a negative which is not a mere denial of some positive fact already established by plaintiffs except by proving certain affirmative facts from which a negative conclusion results. In such case it is of course competent for plaintiffs to rebut each particular affirmative fact so established, and thereby destroy the negative conclusion deduced, but not competent for them to directly attack the conclusion itself by a mere reiteration of their own affirmative fact.

B.

If plaintiffs' claimed the right to introduce their proffered testimony in rebuttal to evidence adduced by defendant it was incumbent upon them to show the purpose of their proposed testimony, and specify the particular fact established by defendant which they sought to rebut. This they did not do.

Upon the trial below in making their offer, Mr. Houghton, for plaintiffs, stated:

"What we offer to show by this witness is, that he, with Mr. Smith, the last witness, made a cross-section of this De Weber road at Buena Vista Slough, at a point where the De Weber road crosses it, near the place where the old pump was. Certain witnesses of

defendant testify as to just what that slough was at that point where the road crosses. We offer to show by this witness that he cross-sectioned that slough at that point, and what the result of that cross-section was."

We are unable to find in this statement any intimation of the particular fact which plaintiffs desired to rebut, and are left to search through the whole mass of testimony introduced by defendant to discover some fact established by them to which to apply this indefinite offer of evidence in rebuttal.

Of all the witnesses introduced by defendant *not one* testified to the non-existence of a slough or channel at the particular point where the De-Weber road crosses.

Moreover, the very language used by Mr. Houghton presupposes that the witnesses, whose evidence he desired to refute, testified that at the particular point designated there *was* a slough or channel. Says he: "certain witnesses of defendant testify as to just what that slough was at that point where that road crosses" Necessarily his statement imports that they had testified that at that crossing there was a slough; and his offer to disprove their testimony, itself shows that there was nothing to rebut or disprove unless, indeed, it be the very case that plaintiffs had attempted to make in their opening.

In his last oral argument Mr. McAllister stated to your Honors that "the defendant in this case called Stoner and Ellis, who testified that there was no slough or channel at the De Weber road crosssing," and he referred you to the record for such testimony. But Mr. McAllister was mistaken in his interpretation of the testimony of these witnesses.

Let us first fix this De Weber road, and then consider the testimony referred to.

If your Honors will look at Map D, you will see on the east side of the swamp, near the quarter section post of the west side line of Sec. 20, Township 29 South, Range 24 East, a point marked "De Weber," and from that point a dotted line or road running first about a mile almost due south into Section 30, same Township and Range, and then in a southwesterly course through said Section 30, and through Sections 25, 26 and 27, Township 29 South, Range 23 East, to a "Corral" on the westerly side of the swamp. This is the De Weber road. You will also notice that this road crosses the traceable channel mentioned in Finding 71 at a point in the northwest quarter of said Section 30. To make certain however that this is the De Weber road referred to, we call your Honors' attention to the testimony of F. P. McCray, one of plaintiffs' own witnesses:

"Mr. Flournoy—Q.—Will you look at that map, Mr. McCray? * * * * Did you make that map? [Exhibiting map to witness.]

A.—I have no reason to believe that I did not. I presume I did.

[The map last shown to witness is marked by the reporter Map D.]"

Trans. 2, fols. 1583–4.

At folios 1605–6–7, same volume, McCray says Map D is correct "of what it shows."

Again:

"Mr. Houghton—Q.—Will you look at this Map D [showing to witness]. There is a road delineated on that map running from a house marked "De Weber"?

A.—Yes, sir; I know where that road runs."

Trans. 5, fol. 141.

Having now fixed the De Weber road, let us turn to the testimony of Ellis and Stoner, referable thereto—if referable at all.

Stoner's testimony is as follows:

On direct examination:

"I have been down on Buena Vista Slough. * * I have been down on the Slough north of Wible's Camp in the Swamp Land District, in 1877. * * * In the spring of 1877 I worked down there; then in the fall I hauled hay off and on for a couple or three months from Jock Ellis' ranch to the camp, which was sometimes above Dover's house, and sometimes below; I mean the ditch camp. They were building a big levee in the Swamp Land District; it was Wible's

Camp, or the parties who constructed that canal. I crossed the Swamp Land District in hauling that hay, a part of the time.

Q.—At what point?

A.—Across Weed Island. There was a road along there. I was hauling hay in wagons. I could not say how often I crossed it; several times. I suppose as many as a dozen times or more. I did not see any water when crossing the swamp at that time. All the water I saw was in the wells—none in holes.

Q.—How was it about a channel crossing there? Did you cross any channel in crossing on the road?

A.—No, sir; I did not cross any channel.

Q.—A good wagon road?

A.—Yes, sir; I did not see any water at all. * *

On cross-examination:

"Mr. Houghton.—Q.—You say in 1877 you were passing across that slough a dozen times, across on Weed Island? Can you fix the point where you made that crossing?

A.—Well, I went in past the De Weber place and crossed Weed Island right through the De Weber place. From the De Weber place I should judge *I went a mile northwest*, and across on Weed Island. There was no natural bed along the road that I remember of. There were two pumps on Weed Island—said to be Weed Island. I suppose it was; everybody called it that, and we camped at these pumps frequently. The road ran within twenty or thirty feet of these pumps. The pumps were to the north of the road. So, in going along that road from the De Weber place across the swamp, we would be a little to the south of the pumps. In going across there, some went down on the levee past the Headquarter Camp. It was nearer for me to go across there; a better route. I don't know whether there was another road or not. That is the only road I know of

across the swamp at that place. It is the only one I ever traveled."

Trans., 3, folios 838 to 844.

From Stoner's testimony it is apparent—

First, that he did not cross the swamp on the DeWeber road, for he says that before crossing he went about a mile NORTHWEST from the DeWeber place, and then from that point he must still have taken a northwesterly course, as his objective point was Dover's Camp in Section 1, T. 29, S. R. 22 (*vide* Map D), whilst the DeWeber road, as we have seen from McCray's testimony and Map D, ran first in a southerly and then southwesterly direction from the DeWeber House. The fact that Stoner states that he crossed Weed Island cannot be held to fix the road he took as being at any particular point, for he himself merely describes it as "said to be Weed Island," does not pretend to assert of his own knowledge that it was Weed Island. Even McCray, plaintiffs' surveyor and engineer, who had surveyed the entire swamp from beginning to end, made maps thereof and traced endless water-courses thereon, says, when speaking of the northern end of Weed Island, "Weed Island is a point I have not definitely established" (Trans., 2, fol. 427). Besides, every witness who testified as to the De Weber Road, whether for plaintiffs or for defendant, even including Ellis, if it be held that Ellis

testified as to that road, stated positively that the road crossed a slough or channel. We also know from the testimony of inumerable witnesses, that whatever channel there was, ceased and disappeared just north of the Bonestell place. Now, not only did Stoner cross from a point about a mile *northwest* of the De Weber place, and therefore through a portion of the swamp north of where the channel ceased, but he himself emphatically states that along the road he took, there was no slough or channel; thus making his testimony correspond with that of many other of defendant's witnesses, and showing that he did not cross on the De Weber road.

Second, plaintiffs' offer in rebuttal was not addressed to any part of Stoner's testimony, for the offer itself was expressly confined to the evidence of those certain witnesses of defendant who had testified "as to *just what that slough was* at that point where that road crosses," and Stoner, as we have seen, did not testify "as to just what that slough was," at the point where the road crossed, or at any other point.

Under either aspect the proposed testimony was inadmissible.

On direct examination, Ellis testified:

"Q.—Do you know anything about the swamp land district below Wible's camp?

A.—Well I don't know a great deal. I have crossed there a few times. I hauled some hay across there in 1877; I think it was in 1876 or '77; I could not say which now. When Mr. Wible was building that big ditch I was hauling for Wible.

Q.—What part of the swamp land district did you cross in hauling?

A.—Well, I crossed part of the time at Headquarters' Camp, and then crossed some in by what they called De Weber Camp.

Q.—The De Weber Camp? Do you know where Weed Island is?

A.—Yes, sir; there is where we crossed, I think, when we crossed at De Weber's. I don't know how often I crossed. I may have been down five or six times * * * *. There was no water in the swamp at that time.

Q.—Is there any continuous channel or bed of a stream anywhere in there—through there where you crossed?

A.—Well, I have never noticed any slough. I don't know that there is. I noticed when I went there that there was not as much of a channel as I expected to cross in that place.

Q.—Was there a road there—a good road?

A.—Yes, sir; a very good road for tule land.

Q.—Did you see anything that indicated the regular channel of the stream?

A.—No, sir; I would not call it a regular channel. There were sloughs—might have been. I didn't follow them down. *There were sloughs.*

Q.—Sloughs on each side of you as you were passing—holes you mean?

A.—Yes, sir; some sloughs along.

Q.—What do you mean by sloughs? How would you describe them?

A.—Well, there are holes where there had been water, but there was no water in them. There was no

water where I crossed. I didn't see any but what was pumped.

Q.—You have never crossed it except at that point?

A.—No, sir; I never crossed right across, and never made any special observation about it * * *.

Q.—In going along there did you find depressions in the swamp?

A.—It was a fair road. There might have been. I don't remember about the sloughs because they were dry.

Q.—Do you remember any channel at all?

A.—THERE WAS A CHANNEL, but not deep. I suppose it was where the water had run off from the swamp, but it was dry there.

Q.—It did not strike your attention any more in one place than in another?

A.—Well, there was a place appeared to be lower, a sag like, but nothing but what you could go right in at that time.

Q.—How wide was that place?

A.—I don't remember now. I cannot say. I think it was along the water edge of the island—of Weed Island, I think it was.

Q.—Did it show any sign of its ever having been a watercourse along there?

A.—There was water flowed all through there. The water would run all over the swamp, and tules were growing all through the swamp."

On cross-examination:

"Q.—Where was this depression that you speak of?

A.—Well, as near as I can remember, it was along in close to Weed Island. I think we had to go half or three quarters of a mile after turning into the swamp and overflowed land, before we could reach this depression.

Q.—How deep was that depression below the ground on each side?

A.—I don't know as I can state exactly, because I was not paying any particular attention, but was only going through with some hay. Did not suppose I would ever—it was just like anybody would go along the road, after I got over it—

Q.—[Interrupting]—You went across there five or six times with a loaded team?

A.—Yes, sir.

Q.—Wasn't there any depression through there which you had to go with your team, and you would take notice, on account of its being difficult to get in or out of?

A.—It was not difficult. A man could go right through.

Q.—Was it quite a pull to pull out of it?

A.—I did not pull more in there than in other places. * * * *

Q.—Do you remember, as you were crossing from the De Weber house, that the pumps were running at that time?

A.—Yes, sir. I don't remember how near to one of those pumps we crossed, but it was not many feet; it was pretty near to it.

Q.—One of those pumps was right close to the slough, wasn't it?

A.—There was an old pump, I think, close to where I crossed. I think a part of the water pumped there ran into a hole that they had there for one pump; and a trough and a hole, I think, for one of them. I expect that hole must have been in the slough. It was a double pump. I don't remember of only one that we passed on the road. There might have been more. I don't remember crossing any other slough or any other depression after passing that pump on Weed Island.

Q.—Did you notice any depression on the west side of Weed Island?

A.—It might be a little sideling. I think it is lower than Weed Island.

Q.—There is a low place between Weed Island and the high land on the west?

A.—I think so. Yes, sir; it is low in there." * *

On re-direct examination:

" * * * I don't remember but one pump running in that course; there might have been more; I think the crossing was about three-quarters of a mile from where the old pump was.

Q.—Was there a pump close to the slough where you crossed on Weed Island?

A.—Yes, sir; there was a pump out on the west side of the island like. We crossed right close to the pump. I should think the road ran maybe within forty or fifty feet of it. I drove up to water there. I could not tell which side of the road it was on. I think it was on the left had side going west. They were working at the time. Mr. Crocker was pumping water there for his stock. * * *

Q. -Did you say the pump was in the slough?

A.—They ran the water into the hole, and they had troughs there, and filled them up. Where I crossed I don't remember there being holes there. I don't remember of there being so much of a place there as there was where the other pump was that I speak of—the old pump which they were not using. The depression that I speak of was at the pump they were not using. That was further east, and this side of Weed Island. I don't remember how far it was. I did not charge my mind with it. This slough that I speak of, or this sinking in the ground, was where the old pump was which they were not using; it was not on Weed Island. As near as I remember, it was before you got to Weed Island—about half way, or three-quarters of a mile, but I cannot state the exact distance."

On re-cross-examination.

"I think the pump that was on the left side as we went west—as we went towards Wible's camp, would be between us and the Buena Vista Lake, but I won't say positively. I am not sure about it. I think in crossing we would reach the slough before we would reach the pump.

MR. FLOURNOY—Q.—Were one of the pumps used on Weed Island, and the other east of Weed Island?

A.—I don't know; I suppose they would call it Weed Island; I don't know exactly.

Q.—You thought it was on Weed Island?

A.—Yes, sir; I thought it was on Weed Island.

MR. HOUGHTON—You don't know where Weed Island is—where it commences on the east line?

A.—I don't know; I suppose the road crossed it there where we crossed the road; I don't know it exactly. That is what we call Weed Island; that is all I know; that was the place I saw cattle at on Weed Island."

Trans. 3, fols. 886 to 907.

Now Ellis either crossed on the De Weber road or he did not. If he did not, then of course plaintiffs' offered testimony relative to the De Weber road was clearly inadmissible and properly rejected as evidence in rebuttal to anything testified to by Ellis. If he did, then the offered testimony was equally inadmissible, for the reason that Ellis distinctly stated that there was a slough or channel at the particular point described.

Though we think ourselves justified—both by the language of Mr. McAllister on oral argument, that—

"The defendants in this case called Stoner and Ellis, who testified that *there was no slough or channel* at the De Weber road crossing. * * * We offered to show by Mr. E. T. Wright * * and by Mr. Smith * * and by Mr. McCray * * that they, immediately after these witnesses say they went to De Weber crossing and found no channel, and found no slough, and found no depression of the ground—that they had gone down there and actually surveyed that ground, and found a channel, and found a slough."

—and by the statements of appellants in their Points and Authorities on the former argument (pages 69, 70, 71), that—

"Defendant, to break the continuity of the slough, * * called as a witness Vandorn Stoner, who testified that he drew hay across the body of swamp land over the De Weber road in 1877, and that in making the crossing he did not cross a channel; * * also, J. S. Ellis, who testified that he hauled hay across the swamp land, over the De Weber road, and that he did not see any slough * * But this was the only evidence of defendant directed particularly to the De Weber road crossing."

—in limiting our discussion to the sole question whether or not these witnesses did so testify; still, lest the contention may hereafter be made that the offered testimony was as to the condition of the slough relative to there being water or no water therein, we submit that in that view of the offer, it was clearly inadmissible.

Ellis testified that when he crossed in 1876 or 1877, the slough was dry. Stoner also crossed the

swamp in 1877, and his description of its condition as to water, related solely to what he found then. Plaintiffs' proposed testimony was that of Wright and Smith, who on the previous Sunday (Trans. 5, fol. 107)—that is, on April 29th, 1881 (*vide* Trans. 5, fol. 2, for date upon which the proposed testimony was offered)—" cross-sectioned from the De Weber road," and of McCray who also "cross-sectioned the slough at that place * * about three weeks ago" (Trans. 5, fol. 142)—i. e., April, 1881. Surely it cannot be contended that such proof of its condition as to water in 1881 was rebuttal or disproof of its condition in 1877. There is too much indisputable and uncontradicted testimony in this case, showing the varied conditions of the swamp relative to water—at one time absolutely dry, at another time covered with water spreading from side to side over the surface thereof, as far northward as the water reached—to permit of any such contention. The fact of the presence of water one day was no proof that the water was there upon another day; particularly in view of the great mass of testimony which showed that while the trial was actually in progress, the water having been turned into the swamp at its southern end was gradually working its way slowly northward from side to side over the whole surface thereof.

Certainly the offered testimony was not in re-

buttal to the testimony of any other of defendant's witnesses than those mentioned by Mr. McAllister—for all our witnesses who testified as to the De Weber crossing distinctly stated that there was a slough or channel at that particular point. Moreover, as we have already seen, appellants themselves state that the testimony of Ellis and Stoner "was the only evidence of defendant directed particularly to this De Weber road crossing." (Appellants' Points and Authorities, p. 71.)

C.

The evidence offered by plaintiffs in rebuttal was inadmissible and properly rejected for the reason, that in their opening case, they did give evidence as to the condition of the slough at the De Weber crossing, and at every other point along its supposed course, going fully and with the most minute detail and particularity into the very question upon which they offered rebutting testimony. They did not in their opening confine themselves, as is contended by Mr. McAllister, to proving *generally* a continuous channel, but endeavored to show *specifically*, section by section, foot by foot, a continuous well defined channel of given width, depth and capacity throughout the whole of Buena Vista Swamp from Kern Riv-

er to Tulare Lake. They gave evidence as to the existence of the channel at *every point* throughout that distance. This their counsel assert positively they did. We quote from the record:

"MR. HOUGHTON—We put on our witnesses and traced the slough down, and, after following the slough continuously, we then asked them whether or not that was a continuous channel.

MR. HAGGIN—Do you mean that you traced with the witnesses that slough from one end to the other, before you asked such a question?

MR. HOUGHTON—I mean to say that we did."

Trans. 4, fols. 645–6.

The opening evidence of plaintiffs, to which we here desire to call attention, was of three kinds:

First—They introduced a number of maps upon which they pictured their sloughs and channels from the River to the Lake, continuous and well defined throughout. It is true these maps do not accord one with another, but such discrepancy goes merely to the effect of the evidence and not to the fact of its having been offered. We refer your Honors to plaintiffs' Maps Nos. 1 and 4, upon which they represent a channel running in almost a straight line through the center of Buena Vista Swamp; and to Maps 2 and 3, whereon they have so twisted and contorted their supposed sloughs and channels as to make them run

through or touch upon every section of land set forth in their amended complaint.

Second—They had their witnesses testify that they had traced a channel from this to that specified or given point (between which points defendant subsequently proved there was no channel) and that between those points the channel was conspicuous and well defined, of such and such characteristics, AT NO POINT less than one, three, five or ten feet deep, nor less than twenty, fifty or one hundred feet wide—whatever they chose to put it. Sometimes they would vary their language and state that between those given points *there was* NO PLACE *at which the water would overflow its banks until after it had reached a specified depth.* In whatever way they put it the evidence was there, in their opening case, as to the condition of the channel at every point relative to which they sought to come back in rebuttal.

Third—Their witnesses—three of them at least, Wible, Norton and Barnes—testified directly to this De Weber road crossing.

F. P. McCRAY, a witness called for plaintiffs, testified:

"My occupation is that of surveyor. * * I have made surveys on what is known as the Buena Vista Slough.

Q.—Have you made surveys there *in tracing sloughs* that run through the body of swamp and overflowed lands along that slough?

A.—Yes, sir.

Q.—Have you, in connection with the survey, platted the same on a map?

A.—Yes, sir."

Trans. 2, fols. 374–5.

McCray then identifies plaintiffs' Maps, No. 2 and No. 3, as having been made by him (fols. 375 and 378). These maps, Nos. 2 and 3, were made about April, 1881. (Trans. fols. 395, 410, 842.) They were made on the very eve of the trial of this case, TO SHOW THE WATER-COURSES (fol. 414).

Map B was also made by McCray (Trans. 5, fol. 143); also Map D (Trans. 2, fols. 1583–4). Map D, however, was introduced by defendant.

"Q.—I understand you to say, Mr. McCray, taking Buena Vista Slough from where it leaves Buena Vista Lake, that you meandered that line or followed it right down to Section 14, Township 29, Range 23 East?

A.—Not the entire distance from Buena Vista Lake.

Q.—From what point then?

A.—From where New River enters the Slough."

Trans. 2, fol. 379.

"MR. MCALLISTER—Q.—The channel of Buena Vista Slough, as delineated on maps 2 and 3, are correctly expressed as they now exist on the ground.

A.—I think so; yes, sir."

Trans. 2, fol. 382.

"I personally meandered that slough from where the North Fork of the delta of Kern River enters Buena

Vista Slough down to Section 14. The line of that slough in this map represents the meander lines—represents the slough. By the slough I mean the channel that runs down through that swamp land. I mean the channel that is marked there by those lines. At the time I surveyed there was no water in it. That was in December, 1877. The channel was marked by perpendicular banks, and by various widths and various depths. There were places where it was fifteen feet deep. In running that meander, *I located that slough by metes and bounds—that portion of it. I established stations at every bend of the channel, and took the courses and distances between those points from one bank to the other.* The subdivision of those lands on Map 2, and the meandering of that slough was done in Dec., 1877, down to Section 14; that is, down to Section 14. In meandering that slough, from where the north fork [*i. e.*, of Kern River] enters Buena Vista Slough down to Section 14, northward, *I did not observe any place where there was no appearance of a channel.* At a point just before reaching Section 14, the slough widens, and the banks are not so prominent as they are above there or a little farther down.

Q.—Down to that point, about Section 14, on to Section 13, are you positive that there was a continuous defined channel?

A.—Yes, sir; I say to the north boundary of Section 24."

Trans. 2, fols. 385 to 388.

On re-direct examination:

"Mr. Houghton.—I understand you to say that you have meandered this slough from the point where the North Fork of the New River runs in down to a point on Section 14, T. 29 S., R. 23 E., where the slough divides?

A.—Yes, sir. I mean that I have surveyed along its banks, taking the courses and distances of the bends.

The condition of it down to that point is, it has various different widths and depths, and perpendicular banks as a rule. The distance from between those two points, without following the meander line, would be 13 or 14 miles."

Trans. 2, fols. 421–2.

"Q.—How deep is that slough, from where you commenced to meander it at the mouth of the north branch of the river, down to where you stopped meandering it?

A.—It has various depths; in many places the water never leaves the bottom. I, of course, could not estimate what the depth of that was. I should think it would average five feet in depth, perhaps more than that.

Q.—How wide?

A.—It will average 60 or 70 feet.

Q.—*Is there any point through that whole distance—I think you fixed it at fifteen miles—where there is not a well defined bank, down to Section 24?*

A.—*No, sir.*"

Trans. 2, fols. 456–7.

"Q.—Will you trace that line and give me the sections that it passes through from the time it strikes the red line, or red land, until it reaches a point—go through these townships, beginning with 30, Range 24?

A.—It runs northerly through Section 10, through the centre, and a portion of it runs through the west half; then across the southwest quarter of Sec. 3, and through the middle of 4; then northwesterly through the northeast quarter of Sec. 5—all of said Sections being in that township; then in T. 29 S., R. 24 E., through the southeast quarter of Sec 32, it runs diagonally across that northwesterly, touching Sec. 31 and Sec. 30, then touching the other township, 29, S., R. 23, E., near the northeast quarter of Sec. 25, and then running northwesterly across Sec. 24.

Q.—Then comes in Sec. 14, where you stopped meandering?

A.—In 14."

Trans. 2, fols. 457-8.

Your Honors will, of course, note that this point, Section 14, T. 29 S., R. 23 E., to which Mr. McCray had personally meandered the slough, is more than a mile north of where the De Weber road crosses (*vide* Map D).

Now, when McCray describes that portion of the slough so meandered by him—from the mouth of Kern River to Section 14—he not only necessarily embraces in his description, given the condition of the slough at the De Weber crossing, but distinctly states that there is NO POINT along that whole course of fifteen miles—not even at the De Weber crossing—where there is not a well defined bank.

J. C. Crocker, one of the plaintiffs, also describes the slough from Buena Vista Lake to the Bonestell place, which your Honors will see from Map D, is north of the De Weber road. Crocker says:

"I think I have been on every acre in that swamp, from one end of it to the other." [Trans. 2, fol. 494.]
"I have crossed at all points most that there are on the map. * * *

Q.—In crossing that slough, as you say you have, at all times of water, haven't you ascertained where the channel that runs down through there is located?

A.—Very near. I could not tell it by survey; I know

by the general lay of the country where it is, *from one end of the swamp to the other.*"

Trans. 2, fol. 495-6.

"Q.—Have you ever been on Buena Vista Slough, from where it leaves the lake to where it divides at the point going around Weed Island?

A.—I have.

Q.—And then *followed it down* as far as the Range line between 27 and 28?

A.—Yes, sir."

Trans. 2, fol. 501–2.

"Q.—Have you been on that slough when there was only a moderate height of water flowing down it?

A.—I have.

Q.—When that was so, how would the water run through Buena Vista Slough?

A.—It would be more confined to its banks. Where there was prominent banks the water would be confined to those banks. Then, where the banks were not so prominent, the water would spread out more.

Q.—When a moderate head of water is running there, it will be confined to the banks where you speak of—those well defined banks? How much territory would be spread over where the banks were not so well defined?

A.—It varies considerably. In some places it would spread over from one-fourth to one-half a mile, and in other places it would spread only very little, if any. It would leave the tule lands on both sides out of water in many places. In many places it would flow back.

Q.—If you should turn a moderate head of water into that slough, so as to fill those channels where they are well defined, would there be a continuous stream right through to Tulare Lake, without overflowing the body of the land?

A.—Yes, sir."

Trans. 2, fols. 505–6–7.

"Q.—Have you ever been through and along Buena Vista Slough when there was no water running in the channels at all?

A.—Yes, sir.

Q.—What was the condition of the channel of Buena Vista Slough from where it leaves Buena Vista Lake?

A.—Well I should have to describe it by sections.

Q.—Describe it by sections.

A.—Buena Vista Slough, from where it leaves Buena Vista Lake, north to within half a mile of where New River runs into Buena Vista Slough, or where it did when I was last there, is a very deep slough, the same as when I first saw it—a very deep slough, but not so much water in it. When you get within half a mile of the mouth of New River, where it enters the slough, it is different there for a distance of two or three miles, from what it was when I first knew it. It is filled up with sediment and sand—grown up with willows. When we first saw it, there was no timber on it. When you get still north of that point, the slough becomes more as it was in former years—wide and deep.

Q.—How far does that continue?

A.—It continues, (referring to Map 2) I should think from the general lay of the country, not from actual survey—I should think there was a deep slough there for about eight or nine miles below where New River enters Buena Vista Slough; then it branches. That is the point where it reaches Weed Island, and branches. * *

Q.—How far does that extend?

A.—It is a very short distance. I presume it may be twenty, thirty or fifty yards. I could not say * *

Q.—What was the condition of the sloughs as you saw them—with no water in them, north from Weed Island?

A.—The sloughs on both sides, you have reference to—on either side?

Q.—Take the main Buena Vista Slough first. What was the condition of that?

A.—When there is water in it, it is in places a prominent slough; prominent steep banks on both sides; at other places sloping banks; in other places it extends out over wide ground, with a depression running through, and the ground rising on each side.

Q.—Is that a marked channel that you can follow through there?

A.—Yes, sir."

Trans. 2, fols. 515 to 520.

On cross-examination:

"Q.—How deep are the banks of Buena Vista Slough from Wible's Crossing down to Weed Island?

A.—Well, very deep from Wible's Camp down to Weed Island. I think it will average in the neighborhood of fifteen feet.

Q.—Is that a continuous slough or channel from Wible's Camp down to Weed Island?

A.—No, sir; not quite to Weed Island.

Q.—How far from Wible's Camp does a well defined and continuous slough extend north?

A.—I think about 3 miles or 4—3 miles."

Trans. 2, fols. 575–6.

"Q.—Is there any one continuous, distinct, defined channel from Buena Vista Lake to Tulare Lake, through there?

A.—I think there is. I am positive of it."

Trans. 2, fol. 592.

[N. B.—Wible's Camp is in the southwest quarter of Section 15, T. 30, S. R. 24 E.]

Crocker further says, in substance:

"Between Wible's and Weed Island the slough is in places 20 feet deep. It runs out as you go towards Weed Island; the nearer you get to Weed Island, the

shallower the banks get. Three miles from Wible's Camp it is more of a depression than a channel; there it ceases to have well defined banks. It is more of a depression in the ground than a channel cut through the ground. In places it has banks; in other places it has sloping banks, and in others again no banks at all."

Trans. 2, fols. 582 to 589; fols. 590 to 605; fol. 641.

"Q.—The entire portion of the channel which extends from Buena Vista Lake clear into Tulare Lake—how high are the banks at their lowest?

A.—At the lowest? In some places there would be no banks at all, but this depression.

Q.—Where there are banks?

A.—There are in many places high banks.

Q.—At the lowest, how deep would they be?

A.—I suppose some of these banks along there would be a foot deep; I think they could not be much lower."

Trans. 2, fols. 681-2.

R. B. STILL, a witness for plaintiffs, testified:

"From the time I went there, in 1874, up to the year 1880, I should think I had crossed that slough a thousand times. I think *I have crossed it on every quarter section on the swamp.*

Q.—I will ask you if in crossing that land you found a water channel *all of the distance between Buena Vista and Tulare Lakes?*

A.—Yes, sir."

Trans. 2, fol. 770.

F. A. TRACY, a witness for plaintiffs, testified:

"Q.—Now what was the condition * * * of

Buena Vista Slough, from the point where it left the lake, *for the first twenty miles down the slough?* * *

A.— * * * There was an open channel of water running down there.

Q.—How far from the lake was that an open channel? * * *

A.—It was an open channel down to the centre of Weed Island; and through Weed Island was an open channel.

MR. GARBER—Q.—An open channel down through the centre of Weed Island?

A.—Down to Weed Island; through it there was a channel, but it was not well open through it.

Q.—What is that?

A.—It was not very well opened. There were some obstructions in there of flags that had grown up in the channel, at the head of it. I mean at the head of Weed Island. * * *

MR. HOUGHTON—Q.—How far down that slough did you go from Buena Vista Lake, before the slough divided and ran around Weed Island?

A.—I think it is about 12 miles down from Buena Vista. * * *

Q.—How wide was Buena Vista Slough channel between the lake, where it left the lake and your crossing? * * *

A.—I think that that would average from 50 to 100 feet.

Q.—How was it from there down where you say it was confined to one channel moving through to Weed Island?

A.—*Running through Weed Island* and down to Weed Island, it ran very much the same. From my crossing, or Tracy's crossing, down two or three miles, it would average from 50 to 100 feet. And then it was not quite as wide, perhaps, for two or three miles more," etc., etc.

Trans. 2, fols. 954 to 960.

THOMAS L. BRIGGS, a witness for plaintiffs, testified:

"Q.—Now, Mr. Briggs, from the time you went on that slough, in 1864, until this year, when you have been passing up and down the slough, crossing it, what have you found in that slough in the way of a channel to carry water?

A.—I found it *a very well defined channel between Buena Vista Lake and Tulare Lake*—that distance between those two lakes.

Q.—Is there a channel defined there that would carry water?

A.—Yes, sir.

Q.—How deep is that channel, upon the average?

A.—From four to twenty feet deep—various depths.

Q.—How wide?

A.—From twenty yards to one hundred yards, in places."

Trans. 2, folios 1105–6.

On cross-examination:

"Q.—Suppose you cross the swamp, which you did do frequently, as you say, directly across from the east to the west, crossed Weed Island, and struck directly across the whole swamp land district, how many channels would you strike?

A.—At one point?

Q.—At what point, crossing at the middle of Weed Island, right across from east to west, about how many channels would you strike?

A.—There is two. One is on the east side of Weed Island. That is the main channel; and the other is on the west side, right at Weed Island. These two channels form Weed Island. There is no other channel than those two. Those channels around Weed Island have not well defined banks in all places. The banks are sloping.

Q.—How many places are there that are not well defined by well defined banks?

A.—I don't know. There is quite a lot of places.

Q.—Can you always find the banks, and know exactly and precisely where the banks are?

A.—Yes, sir.

Q.—How do you know that? Did you try that?

A.—I have been all over the country there, and when I see the banks I can tell them.

Q.—Well, in all places that you saw the slough, you saw well defined banks?

A.—No, sir; I did not say that.

Q.—If there were not well defined banks, how do you know, then—how could you be certain?

A.—Whenever there is banks, I ought to know when I see a bank.

Q.—Of course, where there is a bank you can tell that. I mean where there are no banks?

A.—I did not say that.

Q.—If it had no banks you could not see it?

A.—No, sir.

Q.—There are a great many places where it has none?

A.—Yes, sir."

Trans. 2, fols. 1117 to 1120.

C. W. CLARK, a witness for plaintiff, testified:

"I first came on the slough near Tulare Lake; and I worked all over the slough clear up to Tracy's Crossing." * * * [Tracy's Crossing lies between the southern end of Buena Vista Swamp and Buena Vista Lake.]

"I came right up the swag, following it right up there.

Q.—What do you mean by the swag?

A.—Well, where the channel comes down here—a water-course."

Trans. 2, fols. 1147–8.

"Q.—I understand you to say that you had been, during the different times you have been down there, along Buena Vista Slough from one end to the other, between the two lakes?

A.—I have been about as far as Tracy's Crossing. * * * The time I went up there, in 1865, it was very dry, and we went right up. * * * The water-course was then dried out, with the exception of a few low places.

Q.—What was the condition of that water channel that you followed up from Goose Lake to the Tracy Crossing? What was the width of it?

A.—The channel was very plain.

Q.—The average width?

A.—The channel was very plain; no trouble about a man following it up. I could not say what the average width of it was, because it would run along—it was cut up in different shapes. I suppose in places where it was confined it was from 75 to 100 feet; in other places it would spread out 100 to 200 feet, whenever there was washouts—that is, the bed, the place where the current ran."

Trans. 2, fols. 1170–1–2.

GEORGE RACINE, a witness for plaintiffs, testified:

"I next went to the Slough in 1865, in the spring of the year. I struck the slough at that time at Tulare Lake, and *went right on up the slough* as far as Tracy's Crossing. * * * I was going up the slough at that time and crossed the slough. I do not know, I could not tell how many times; too numerous to mention; I could not say.

Q.—At how many different points did you cross the slough after going up there?

A.—Well, I could not tell that; but a good many, though.

Q.—What was the condition of the water in the slough at that time?

A.—There was no water; that was in 1865. After going to Tracy's Crossing, *I went back the same way.* * * * I was next on the slough in 1867, * * * between Staten Corral and Tulare Lake. Then *we worked right on up the slough,* to Tracy's crossing.

Trans. 2, fols. 1237–8.

"I went to Buena Vista Slough in 1869. * * * I struck the slough at the same place, about the same place. And then *I continued on up the slough,* in about the same country."

Trans. 2, fol. 1241.

I think I was there again in 1874. * * * I struck the slough that year about the Tule House. * * * *I followed up the slough* on the east side. I went up to Tracy's Crossing. I crossed there. * * * After crossing there I went down the west side and *along the slough.* I don't know how long we were going. It might have been a week, or eight or ten days, * * * I was there again in 1875. * * * I struck it then on the east side of the Tule House. Then *I went up the slough;* I think I came up as far as Weed Island and crossed there.

Q.—What kind of a crossing did you find at that time?

A.—Very bad, swimming. I think I found two; may be two channels there, if I recollect right. I think there is an east channel and a west channel, *and a channel that goes right through Weed Island a part of the way.*"

Trans. 2, fols. 1246–47.

"I went there again in 1876. * * * That year I struck it at Goose Lake, in 1876. Then I went south *along the slough.* I think I went up opposite Weed

Island. * * * I was there in 1877, the next year. I struck it that year at Tracy's Crossing and went on down as far as the Adobe Holes. The Adobe Holes are on the West side. * * *

Q.—What was the condition of the water at that time, in 1877?

A.—There was some water here at Tracy's Crossing. Below there was not any.

Trans. 2, fols. 1248–9.

I could not say at how many different points I have crossed the slough running through that swamp land, during the time that I have been on it.

Q.—Do you suppose you were on *every section of land that it runs through?*

A.—Very nearly it, I think.

Q.—What kind of a channel is it that runs down through that body of swamp and overflowed land from Buena Vista Lake to Tulare Lake?

A.—It is a well defined channel.

Q.—How deep upon an average?

A.—I could not say how deep; in places where there are steep banks, such as there is from Buena Vista Lake down to Norton's Camp, or at the Wible Camp, some places there it would be eight or ten feet deep, the banks, and in some places less. Some places below, before we got to Weed Island, was very steep banks; eight or ten feet high. *Then you came to the banks that are sloping banks, and the water would not be over five or six feet* In some places it would be fifteen or twenty feet deep. It runs on in that way clear through."

Trans. 2, fols. 1257–8–9.

JESSE DOVER, a witness for plaintiffs, testified:

"I live on the swamp on Buena Vista Slough. I cannot locate it on the map but I guess you all know

where Dovers' Hog Camp is without my showing it to you on the map. It is about 15 or 16 miles from Wible's Camp, and about on Sec. 1, T. 29, R. 22. (Indicating place on map.) I went there in 1876; I think it was in July. I went there to raise hogs, and I am there when I am at home. I have been in the hog business ever since. I ran my hogs around over the country there on Buena Vista Slough, between the Adobe Holes and Weed Island. I have been there with my hogs ever since. I went there taking care of them myself.

Q.—In going through that other body of swamp land, have you become acquainted with the sloughs or channels that run through that land?

A.—Yes, sir; I have *for a distance of 15 or 20 miles both ways*, north and south, from my camp.

Q.—How far have you worked your hogs north?

A.—Well, they ran to the Adobe Holes, about 14 miles, some of them. On this side I had some hogs.

Q.—How far do they run south?

A.—Seven or eight miles.

Q.—What is the condition of the channel running through that swamp land, between the point that you have spoken of and the point where you keep your hogs?

A.—Well, there is some places a big, fine slough; and at other places it is not very deep.

Q.—How many sloughs are there running through between those points?

A.—Well, there are places where you can cross the swamp, and you cannot find but one slough, and there are other places where you will find three.

Q.—What is the average size of the main slough that runs through there, *between the points 15 miles below your camp—the adobe holes, I should say, and the 7 or 8 miles above, where you ran?*

A.—Well, it would average between 3 and 10 feet deep, I guess—some places 3 feet deep, other places about 10.

Q.—In running through there, have you been upon every section of land along that country, two or three miles?

A.—I would not say positively. I am in that swamp every day that I am at home, *and if there is a spot there that I have not been on, I don't know it.*"

Trans. 2, fols. 1261 to 1265.

F. M. EPPERLY, a witness for plaintiffs, testified:

"I reside down here on Buena Vista Slough. I came on to the slough in 1871 * * to a point * * known as the Dover Camp. * * I remained there until May, 1876. I was living there all that time and raising hogs. * * I was running them on the tule land there, on Buena Vista Slough, * * about 9 miles of front there, * * 9 miles north from Weed Island."

Trans. 2, fols. 2170 to 2172.

"Q.—While you were at Dover's Camp, between 1871 and 1876, were you crossing the sloughs between the two points you have mentioned?

A.—Yes, sir.

Q.—Often?

A.—Yes, sir; crossed there often.

Q.—How often?

A.—Well, that I could not enumerate very well, because I was working all the time in those tules there looking after my hogs, and the number of times I crossed I could not tell you. I was working along there on that swamp land between those two points, and working over about nine miles, all of it. * * I returned in 1877 back on to this swamp. * * I remained there about four months. * *

Q.—Were you at that time doing anything in connection with the swamp land there? Were you going through it at all?

A.—Yes, sir; I was traveling through it more or less every day. I was traveling from Weed Island to six miles below, to Dover's Camp, traveling over a space of about nine miles there, in that country. That is a portion of the same nine miles that I have spoken of before."

Trans. 2, fols. 2175 to 2178.

"Q.—Have you ever been on Buena Vista Slough, south of the north end of Weed Island—that is, between the north end of Weed Island and Buena Vista Lake?

A.—Yes, sir; I have been there a number of times.

Q.—How many times?

A.—Well, that I could not tell you. I could not tell you how many times I have been there. That is something I could not answer, because it is hard for a man to recollect the number of times, traveling around there the way I was. I suppose I have been there 50 times, maybe more. * * I was on the slough at different points, traveling all up and down the slough. I was traveling up and down the slough on the west side of it, nearly the whole length of it there, between those points. * *

Q.—What was the condition of the slough at that time between Tracy's crossing and the Bonestell House?

A.—Well, there was a channel, a perfect channel from the Bonestell House, below the Bonestell House, up to where you come to what is known as the drift, and there the water spread out some from the formation of this drift, made two or three different channels, and they all came back into the same one, with the exception of one that made out on the west side—that followed down on the west side of the swamp.

Q.—What was the condition of the channel above the drift?

A.—There was a well defined channel from there on out.

Q.—How wide was that channel at that time?

A.—Well, that channel must have been—well, it was different widths; some places sixty to one hundred and twenty-five feet, may be one hundred and fifty. * *

Q.—How deep was that channel?

A.—Well, I think that that channel must be—I think it would average seven feet.

Q.—What kind of banks has that channel down below as far as the Bonestell House?

A.—The most of the way down to the Bonestell House it has got banks. There are a few places that I could not cross it well on account of the banks being straight up and down. I have crossed that channel when there was running water in it at the Bonestell House. * * I have also crossed that channel *about a mile above the Bonestell House, south.*

Q.—*Is there a crossing at that point?*

A.—*We used to have a crossing there* that we passed at. I first crossed it *there* in 1873, *and it swam my horse.* I have crossed it *there* a number of times since. I could not say the number. I have not crossed there recently. I have not crossed that channel at any other point above the Bonestell House, except that until you get up above the head of Weed Island, but I have crossed it there."

Trans. 2, fols. 2185 to 2192.

On cross-examination:

"When were you last on that part of the channel that runs from headquarters, or Wible's Camp, down by Bonestell's?

A.—I was on that channel last Saturday.

Q.—How far did you follow that channel from headquarters?

A.—I followed it from the Bonestell House up to Norton's Camp.

Q.—What is the condition of that channel between those two points?

A.—Well, if I remember right, I didn't see but two or three places that was flowing over the banks any. There was some low places making out, that the water was breaking out into; one place very close to the drift where the water was running out. It was running out in that flat channel on the west side, in the western channel. I crossed the water there running into the western channel; I don't suppose there was over ten inches in depth of water running out there, maybe more. When I crossed there in the main channel, I think there must have been about four feet, or very nearly it; I should judge just from the appearance from the bank. I crossed the channel at the Bonestell House. At the Bonestell House there must have been four feet of water in the channel. * * A little over a week ago I was on that channel below the Bonestell House. * * At that time I followed the channel from the Bonestell House up to headquarters. The water at that time was all confined to the channel; it was not overflowing the banks, nowhere."

Trans. 2, fols. 2240 to 2243.

"Q.—Did you ever follow the channel from Weed Island, all the way, every bit of it, to Wible's Camp?

A.—Yes, sir; I have been around the bank of the slough, all the way through.

Q.—You have been all along there?

A.—Yes, sir.

Q.—Was it the same channel all the way?

A.—With the exception of that drift pile, as far as I remember; I don't see any change from the first time I ever saw it to the present. The drift pile I speak of is above Norton's Camp about a mile and a half, I think; it is but a short distance from the south end of Weed Island; I couldn't tell you exactly how far."

Trans. 2, fols. 2256–7.

"I don't know of but one place where there is a drift pile in the channel between Norton's Camp and Weed Island; I have traveled all up and down that channel in different directions, and I don't know of but one place; I couldn't say that I have traveled every foot of it; a man is not liable to step over every foot of it.

Q.—I mean, have you been on the margin of it all along?

A.—I have been on the margin of it all along, from the Bonestell House to Norton's Camp; I have been on it as far up as Wible's Camp; I have seen it in holes."

Trans. 2, fols. 2260–1.

"Q.—Do you know any place at all, Mr. Epperly, from Wible's Camp to the Tule House, where you can cross that swamp land district without striking any channel at all?

A.—No, I don't without striking any channel at all; I know places where I can cross where the channel is small.

Q.—I don't mean crossing in a straight line. I mean, *don't you know, that there are places there that you can cross by riding around the hole, the depression, without striking any channel at all,* from the east to the west, or from the west to the east?

A.—No, sir; I don't.

Q.—You do not; well, what would you always find in the shallowest part of the channels that you speak of now?

A.—Well, I would find a body of water running down through the swamp; if there was no water in the shallowest places that I know of in there, I would find a depression in the land, where it would possibly take two feet and a half of water to throw it out again, and spread it outside over the grouud; I think it would carry at least two feet and a half of water."

Trans. 2, fols. 2266 to 2268.

MILTON NORTON, a witness for plaintiff, testified:

"I first located about three miles above Dover's Camp, on the west side of the slough. * * * Commenced pumping in June, 1877, I think, and continued until March, 1878. I was attending to the pump and pulling cattle out of the mud-holes; that was about all.

Q.—During the time you were there, between June, 1877, and March, 1878, along what part of the slough were you going in pulling those cattle out?

A.—Well, we were from Wible's Camp; I think it is down about twenty miles. * * *

Q.—How often, Mr. Norton, would you be along the slough during those months?

A.—Probably crossed them from one to ten times a day.

Q.—For how long?

A.—I think I was there nearly all the time. My business since August, 1878, has been raising hogs and farming some. * * *

A.—Well, they run from Wible's down to the lower end of Weed Island; the lower end of Weed Island is not very far; probably three-quarters of a mile below Bonestell's.

Q,—Do you know what was the condition of Buena Vista Slough between the place where it leaves Buena Vista Lake and the place where you have been running your hogs—three-quarters of a mile or a mile below Bonestell's—when you first saw it?

A.—When I first crossed it, the first time, it was dry, except in holes.

Q.—Well, what was the dimensions? What was the average width of that slough between those points, when you first saw it?

A.—I think it would average about 125 feet wide, and will average between 12 and 15 feet deep.

Q,—What kind of banks has it during that distance?

A.—Well, the banks for most of the distance are steep, and only at places you can cross."

Trans. 2, fols. 1670 to 1674.

"Q.—Have you ever seen that slough between Buena Vista Lake and the Bonestell House when it was all dry?

A.—I have seen it when it was, except in the water holes; water holes don't dry up.

Q.—At such times how deep would it be down to the bed of the slough, or to the water, from the bank?

A.—Well, it would be about, I think, six feet.

Q.—What depth of water would you have to put in that slough between those points, before it would overflow its banks?

A.—I could not tell exactly; I would think—do you mean when the slough is dry?

Q.—I mean how much water would you have to run above the bed of the slough, when it is dry, before the slough would overflow its banks?

A.—I could not tell exactly; I think about six feet, though."

Trans. 2, fols. 1676–7–8.

"I have been along the banks of that slough recently * * * I was along the slough last Thursday. * *

Q.—Where did you first strike the slough on Thursday? * * * Did you strike it at the Bonestell House?

A.—Yes, sir.

Q.—After striking the slough at the Bonestell House, where did you go?

A.—We followed it up to where I live.

Q.—How far south, following the course of the slough from the Bonestell House, is it to where you live?

A.—I should judge it to be about 8 miles following the slough.

Q.—Was there any water in the slough when you were following it?

A.—Yes, sir.

Q.—What was the condition of the water at that time?

A.—Well, it was running in the slough.

Q.—How much water was running in there at that time?

A.—I think it was about three feet deep.

Q.—Was it overflowing its banks at any place?

A.—No, sir; I went along on horseback; I kept right along by the side of the slough all the time; I didn't cross it at all between the Bonestell House and the camp."

Trans. 2, fols. 1678 to 1681.

"Q.—When you followed down the slough between those points—between your house and Dover's—last February, what was the narrowest place where the water was running in the channel?

A.—I think the narrowest place must have been 50 feet.

Trans. 2, fol. 1690.

Q.—How many places are there on the Buena Vista Slough, between the old Tracy crossing and Bonestell's house, that you can cross the slough when it is bank full?

A.—Well, if we want to swim, we can cross most any place, except down below the drift pile there.

Q.—How many places are there, when it is bank full, that you can cross it without swimming?

A.—Well, sir, I think there would be *one place probably within a mile of the Bonestell house*—A MILE SOUTH.

Trans., 2, fols. 1697–8.

This last crossing referred to by Norton, is unquestionably the DeWeber road crossing.

S. W. WIBLE, a witness for plaintiffs, testified:

"Q.—How far down Buena Vista Slough have you been from what is known as the Old Tracy's Crossing on Buena Vista Slough? How far north from that point have you been?

A.—I have been down to Tulare Lake. * * Three or four times.

Q.—How many times have you been down Buena Vista Slough from the old Tracy Crossing to the Bonestell House?

A.—Well, I can't keep account of the number of times I have been there. I think I have been down there every year since I have been on the Works.

Q.—What kind of a slough or channel is that from the old Tracy Crossing to the Bonestell House?

A.—It is a deep channel.

Q.—How deep do you think? How deep on an average?

A.—Well, it would not be probably less than 7 feet on an average or 8 feet. It is very much deeper in places. I have found places where it was 20 or 25 feet deep, and it is from 50 to 150 or 200 feet wide."

Trans. 2, fols. 1755 to 1757.

"I have often crossed the channel of Buena Vista Slough. I have crossed it above headquarters. I used to ford it there. At Tracy's Crossing I have crossed it very often. I have crossed it below headquarters. I have crossed it right at Headquarter Camp. We had a crossing there; and have crossed it to Weed Island. * * * *We had an old crossing there on Weed Island.* I HAVE CROSSED IT THERE VERY FREQUENTLY. *I have crossed it at the Bonestell House,* JUST ABOVE HIS PLACE ON SECTION 24."

Trans. 2, fols. 1759–60.

"I was last on the portion of Buena Vista Slough, south of the Bonestell House only two days ago. I

crossed at the Bonestell House. That was the 24th I believe, on Saturday last.

Q.—How wide was the channel where you crossed it at the Bonestell House?

A.—Well, it must have been 40 or 50 feet wide.

Q.—How deep was it?

A.—Well, it did not come right into the buggy bed, I should judge 3 feet or 3½ feet, probably. It might have been a little deeper than that. It might have been a little less. I was there in a buggy.

Q.—After crossing the channel where did you go?

A.—From there I went up to headquarters, followed the channel right up, driving right along on the banks in most places. Once in a while would come into a bend and strike across.

Q.—Where you would drive across those bends at any time how long would it be that you would not see the channel?

A.—Oh, I could see the indications of it all the time, very little way from it.

Q.—What was the longest distance you were away from the channel so that you could not see it?

A.—Oh, it was about—I was often right close to it when weeds or something of that kind would hide it from me more than the distance really. Probably would be sometimes 100 yards. I could not tell exactly.

Q.—At what distance, the greatest distance would the channel be out of your sight as you drove along there?

A.—A very short distance going across these short bends, probably 100 yards across a bend, might be 100 yards from there into the bend. There was but very little channel but what I could see. In going from the Bonestell house on the channel to headquarters there might have been a quarter or a half a mile of the channel that I did not see.

Q.—Did you find in driving out there any places and

spots, and if so how many, where the water would overflow the banks of the channel?

A.—There was but one place, or probably two places where the water had run out a little. One place I ran around it and the other I went across it just a little bit.

Q.—How wide was it and at what point was it that the water was running out that you crossed it?

A.—Well, it was just running out over the banks. I think I drove into it and then drove out again, just above Weed Island. There was one little place down on Weed Island where there was a high water channel or something running out a little ways. I don't know how far, but a little ways, just barely ran enough to wet your feet.

Q.—Was it 100 yards or half a mile in that middle channel, the first one you came to after leaving the Bonestell house?

A.—The first that I crossed, I could not tell how far it ran; but it did not run far for the reason that I afterwards ran around the end of it. It might have run out two or three hundred yards. Where I crossed it a small stream probably six or eight inches deep.

Q.—Then you say you reached a point again at the head of Weed Island where the water was running out. How wide was it where it was running out at that point?

A.—Well, I didn't get right up to the slough. I did too—I went up to one side where it was running out. Then I went around it, and came to where it was running out again. Whether it was all solid water running between that I could not tell.

Q.—How wide was it between those two points?

A.—Well, probably 200 or 300 feet, maybe 200 feet. I could not tell exactly. I drove around and across it. I was probably 100 yards from the slough when I crossed it.

Q.—How deep was the water at any point when you drove through there?

A.—Well, when I drove through it was just in the

channel—the western channel there. It was just entering that, and I suppose where I crossed, probably there was a foot of water in there.

MR. GARBER—Q.—You mean at the western channel?

A.—Yes, sir; it was just entering into that.

MR. HOUGHTON—Q.—Then the water that was running out of the slough, was that at the mouth of the western channel.

A.—That was at the mouth of the western channel.

Q.—After crossing that point, did you find any more water running out of the slough over the banks?

A.—No, sir.

Q.—How far did you say you went?

A.—I went to headquarters.

Q.—What was the distance that you drove along the banks of the slough in that swamp, following the meanderings of the slough?

A.—Well, I really don't know; probably 12 or 14 miles.

Q.—What was the condition of the water in the slough?

A.—There was quite a body of water running in it there. Where we crossed it below, there was three feet and a half of water anyhow—running water.

Q.—What was the condition of the slough above as you approached the headquarter camp?

A.—Well, it was deeper as you go up.

Q.—Then I understand you to say that you started from Bonestell's house?

A.—Yes, sir.

Q.—And followed the channel around to headquarters?

A.—Yes, sir."

Trans. 2, fols. 1762 to 1771.

We have given these lengthy extracts from Wible's testimony for two purposes: first, to show

that the witness, having crossed Weed Island "on the old road south of Bonestell's"—the De Weber road—testified as to the appearance and condition of the channel at that point, and: second, to show that in their opening case plaintiffs went into an exhaustive description of the slough, from point to point, along its whole course, and did not confine themselves, as Mr. McAllister would have your Hanors believe they did, to mere "*general proof*" of a continuous channel from the river to the lake.

Thus far we have shown, *generally*, as Mr. McAllister might term it, that in their opening case plaintiffs did introduce evidence upon the condition of the supposed slough at *every point* between Kern River and Tulare Lake.

We will now show, as possibly he may concede, *specifically*, that in their opening case plaintiffs gave evidence upon the condition of the slough at the very point mentioned—the De Weber Road crossing.

Three, at least, of plaintiffs' witnesses testified directly as to that point.

First, there was Milton Norton, who testified that there was a place "a mile south from Bonestell's"—the very point at which the De Weber road crosses—where the slough, when full of water, "could be crossed without swimming" (*Ante* page 54).

Then came Wible, who testified to "an old crossing there on Weed Island, just above Bonestell's place, on Section 24, where he had frequently crossed" (*Ante* page 55).

But pre-eminent amongst them all was—

T. W. BARNES, a witness for plaintiffs, who testified:

"Q.—At about how many points have you crossed Buena Vista Slough, starting from Tracy's crossing and down to Goose Lake?

A.—Well, that would be a right hard matter for me to tell; going in and out there so many years, I could not tell you exactly how many places I have been. * * * I have crossed at the Canal Camp, at Weed Island—the upper end of Weed Island; I have crossed Weed Island; I have crossed the slough going north of Weed Island; and I have crossed down alongside of Weed Island on both sides clear across the swamp; THERE FROM THE DE WEBER PLACE TO THE LITTLE CORRAL; I HAVE BEEN CLEAR ACROSS THAT SLOUGH, THE SWAMP THERE, FREIGHTING ACROSS THERE.

Q.—When you have made those crossings and the water was running in the creek, how deep did you find the water?

A.—I never measured the water in the channel; I never measured the depth of it.

Q.—Would it be swimming?

A.—I found it deep enough to swim most anything; deeper than I wanted to go through; I have found the slough swimming, and I have found them dried down into holes; when the water was running full it would swim most anything.

Q.—Going across the slough, when the water was running there, how far did you usually have to swim? How wide did you find the channel?

A.—That would be rather hard for me to say; a man riding along, going with his team, hardly ever thinks about the question being asked him—how far the channel is. I SUPPOSE THE WIDEST CHANNEL THERE IS 60 TO 100 FEET WIDE, *opposite Weed Island; the main channel of the slough would be probably from 60 to 100 feet wide; may be more, may be less; I would not say exactly the exact width of it, because I never expected the question to be asked me.*" (Trans. 2, fols. 1337 to 1340.) "*The main channel there opposite Weed Island, I think, is all of 100 feet wide, and probably more; I would not say positively the exact width of it, because I never measured it.* I HAVE SEEN THE CROSSING, *and have crossed it when I had no team, and probably crossed there when it was dry; I* never expected the question would be asked me; I never paid any particular attention. I KNOW THAT IT IS A GOOD DEAL LARGER THERE THAN MY POLE AND WAGON AND ALL, WHEN I HAD A LONG HAY FRAME ON MY WAGON, HAULING HAY."

Trans. 2, fols. 1346–7.

On cross-examination:

"The whole swamp was dry *from the De Weber place across.* Mr. Crocker had a number of wells there to pump water for cattte. I camped at his well."

Trans. 2, fol. 1359.

Now, if any possible construction of the testimony of Ellis and Stoner can lead to the conclusion that those witnesses testified "as to the condition of Buena Vista Slough at the De Weber Road crossing," then must that same construc-

tion be applied to the testimony of this witness Barnes, and it be held that he too testified as to its condition at identically the same point. He states that he crossed there "*from the De Weber place to the little corral,*" the very points from and to which, as shown by Map D, the De Weber road runs. He *freighted across there; rode along there with his team; saw the crossing, and knows that it is a good deal longer there than his pole and wagon.*

Can Mr. McAllister still contend, after we have called your Honor's attention to this testimony of Barnes and to that of Wible and Norton, cited *ante*, that plaintiffs did not offer evidence in their opening case upon the condition of the slough at the De Weber road, or that their proposed evidence in rebuttal upon that point was not properly rejected?

In addition to the testimony above set forth, we further call your Honors' attention to plaintiffs' own version of the evidence offered by them in their opening relative to that portion of the slough which is crossed by the De Weber road.

"We have," say they, "the testimony of no less
" than eighteen witnesses, all called by plaintiffs,
" nearly all of whom have spent the best years of
" their lives on and along Buena Vista Slough
" either attending to cattle and hogs owned by
" them, or in the employment of those who had
" stock on the swamp land through which Buena

" Vista Slough runs. They all testified fully as
" to the channel of Buena Vista Slough from Buena
" Vista Lake to Section 24, T. 29, S. R. 23 E.
" Their testimony is clear, uniform and conclusive
" to the point, that there is a continuous and well
" defined channel down to said Section 24."
(*Vide* Appellant's Brief, page 154.)

Thus far in referring to the evidence introduced by plaintiffs in their opening case on the points suggested by their offer in rebuttal, we have had in view more particularly that portion of their evidence which related to the De Weber road crossing. Upon his oral argument, however, Mr. McAllister suggested that there were many other crossings made by defendant's witnesses in other portions of the swamp whereat they testify there was no slough or channel, and relative to which plaintiffs had also offered evidence in rebuttal to disprove such testimony.

As an analysis of the testimony relative to the De Weber crossing shows that plaintiff did introduce evidence upon the condition of the slough at that particular point, so with equal force will an analysis of their testimony show that evidence had been gone into in their opening case as to its condition at each of the other crossings.

If a witness testifies that he has traced the slough from Tulare Lake to Kern River, or from any one given point to another given point, and

that between said points the shallowest portion of the slough is one or two feet deep, ten, twenty or thirty feet wide, it is then simple nonsense to contend that that witness did not testify as to the existence and condition of the slough at each and every intermediate point or crossing between those extreme points. That plaintiffs did attempt on their opening to establish the existence of a slough of a minimum depth of one, two or three feet, and a minimum width of ten, fifteen or twenty feet, is beyond dispute.

We will not undertake to quote here all the testimony offered by plaintiffs in their opening relative to the slough or sloughs at these several other crossings, but simply refer your Honors to the volume and folio of the record where such testimony may be found—if wanted.

F. B. McCray, as we have already seen, (*ante* page 31, *et seq.*) testified as to the condition of the slough from Kern River to Section 14, T. 29, S. R. 23 E., having meandered it northward to that point. He then takes it up where he left off his meanderings and traces it *section by section* through the balance of the swamp. (*Vide* Trans. 2, fols. 390 to 409; 425 to 464; 807 to 817; 845 to 849; 852; 855 to 865; 909 to 916; 1616 to 1644; 1647 to 1649.)

Crocker also after describing the slough to the north end of Weed Island, testifies as to its con-

dition from there on. (Trans. 2, fols. 519 to 522; 592; 595–6; 639 to 643; 670 to 689.)

S. W. Wible also. (Trans. 2. fols. 1771 to 1798; 1941 to 2005; 2051 to 2067.)

Clarke, a witness for plaintiffs, also testifies as to the condition of the slough from Tulare Lake to Kern River. (Trans. 2, fols. 1173–4.)

Also Gibbs. (Trans. 2, fols. 1390 to 1405; 1410 to 1420.)

And Norton. (Trans. 2, fols. 1682 to 1689; 1693–4.

And Burgan. (Trans. 2, fols. 1743–4; 1747.)

And Epperly. (Trans. 2, fols. 2199 to 2202; 2237 to 2253; 2266 to 2271.)

See also the testimony of R. B. Still (*ante* p. 39), F. A. Tracy (*ante* p. 39), Thomas L. Briggs (*ante* p. 41), Geo. Racine (*ante* p. 43), and Jesse Dover (*ante* p. 45).

We deem it proper to here call your Honors' attention to our former Brief in this cause, Part 1, page 105 to 222, wherein we have conclusively shown that notwithstanding many of plaintiffs' witnesses testified both generally and specifically to the existence of sloughs and channels within the swamp, there is in fact no slough or channel, or system of sloughs and channels therein, which could support or justify a finding of water-course.

SECOND.

THE ERROR, IF ANY, WAS IMMATERIAL, AND DID NOT INJURE OR PREJUDICE PLAINTIFFS.

A.

Plaintiffs claimed that they were owners of certain lands along or upon a natural stream or water-course, and by virtue of such ownership were entitled to the English Common Law rights of riparian proprietors.

To maintain such claim it was incumbent upon them to prove, amongst other things, a *water-course*. This they failed to do, and would not have done even had their proffered testimony in rebuttal been admitted and they successfully established the existence of a continuous channel. The mere fact of channel, with bed and banks however well defined, was not alone sufficient to substantiate their claim. Bed and banks do not constitute a water-course; there must also be water, flowing water, within such banks. The water need not flow continuously, but it must flow with certainty, and its flow must be usual and accustomed; though at times it may spread beyond the banks, yet in its usual flow it must be confined within the banks,

and the direction of its current must correspond with that of the bed and banks.

However conclusively plaintiffs might have proved a channel, had their testimony in rebuttal been admitted, such proof could in no wise have aided or benefited them, for their case as to flow of water, good or bad, had been made in their opening, and no proof of channel could have added to or bettered that case. The ultimate fact to be found in their behalf was water-course. The two main probative facts necessary to such ultimate fact were, first, channel, and second, usual and accustomed flow of water. Proof of one, without proof of the other, could not justify or support a finding of water-course. Both must be proved, else the ultimate fact is not established.

Now, from the evidence adduced, the Court finds that there is no usual or accustomed flow of water. It finds:

Finding 65—"That the natural drainage of Kern River and the surrounding country is, and ever has been, to and into Kern and Buena Vista Lakes; * * * that the natural and usual flow of the waters of Kern River * * is and ever has been, to and into said lakes; and that the ordinary and natural receptacle, terminus and place of discharge of the natural, usual and accustomed flow of the waters of Kern River is and ever has been, to and into Kern and Buena Vista Lakes."

Finding 9—* * "That in times of melting snow, causing occasional and unusual freshets and extraordinary high water, some water would overflow the banks of said river, at or in the vicinity of Buena Vista Slough, and a portion of such overflow would extend to and as far northward as it reached, spread from side to side over the aforesaid body of swamp and overflowed lands designated as Buena Vista Swamp."

Finding 12—"That until the construction of the works of the Kern Valley Water Company, in these findings mentioned, occasionally in the winter and spring time of the year, unusual freshets would cause Kern and Buena Vista Lakes to overflow, and a portion of such overflow would find its way northward along Buena Vista Slough and the adjacent country, to and over said body of swamp and overflowed lands, within which plaintiffs' said lands are situated; following, however, no defined course or channel, but generally spreading from side to side throughout said swamp, as far northward as the water reached."

Finding 66—"That the waters of Kern River do not and never did naturally and usually flow to, through, along, by, over or upon the said lands of plaintiffs, or any part thereof; and that until the year 1876, whatever of the water of Kern River flowed to or reached the said lands or any part thereof, was from the unusual and extrordinary overflow of said river or of Kern and Buena Vista Lakes, or from the percolation and seepage in these findings mentioned."

Finding 71—* * * "That said waters do not constitute a regular flowing stream or water-course, but consist * * * of occasional bursts of water which, in times of freshets or melting snow overflow the banks of the River above, or flow out of Buena

Vista and Kern Lakes after having been stationary therein, and inundate the whole of said swamp as far northward as the water reaches. * * * That whatever flow or movement said waters have, or ever had, is not and never was usual or accustomed." * * *

Finding 72—That the flow of the water to said swamp "is not usual, definite or accustomed as is, nor does it correspond with that of the waters in Kern River before reaching Buena Vista and Kern Lakes, but is only occasional." * * *

Finding 13—"That, except from the seepage and percolation and the overflows in these findings mentioned, and from the effect of the artificial obstructions at Cole's Crossing in these findings described, *none of the waters of Kern River flow, or ever have flowed to, along, by, through, over or upon the lands of plaintiffs, or any part thereof.*"

Finding 17—"That in their natural condition, whatever of the waters of said river or of said lakes find, or ever found, their way northward and into said swamp, do not and never did so flow as to constitute a water-course." * * *

Finding 46 — "That no water-course or natural stream flows or flowed to, along, by, through, over or upon said lands of plaintiffs, or any part thereof."

Finding 45—"That said lands of plaintiffs have never bordered or been situated, in whole or in part, upon any water-course or natural stream."

That these several findings are fully supported by the evidence, is beyond all question. (See our Brief on former hearing, Part 1, pages 222 to 237; also pages 40 to 105.)

There being, then, a total absence of one of the essential elements—usual flow of water—necessary to constitute a water-course, the Court could not have found in favor of plaintiffs, however well they may or might have established a channel.

B.

Had plaintiffs in rebuttal proved a channel at the De Weber crossing, and at every other crossing made by defendants, such proof would have been immaterial and of no avail to them in the face of the fact found that the water which reaches said swamp spreads from side to side over the whole surface thereof as it works its way slowly northward.

Assuming an accustomed flow of water, assuming, too, a defined channel within the swamp, still, if the water in its usual flow is not confined to that channel, but extends to the outward margin of the swamp, the lands bordering such margin constitute the banks, whilst the swamp itself is but the bed of the stream, and whatever channels or lines of depressions are found within the swamp are immaterial—mere threads of the stream, or irregularities in the surface of its bed. The swamp is the water-course, and the government alone is the riparian proprietor thereon.

The Court so found:

Finding 17—"In their natural condition, whatever of the waters of said river or of said lakes, find or ever found their way northward and into said swamp, do not and never did so flow as to constitute a watercourse; and the same are and always have been used and accustomed, whenever they reach it, to flow generally over and through said swamp and to squander themselves over the same, spreading from side to side, *and having as a boundary and border on each side, the public lands of the United States, outside of the segregation lines of said swamp.*" * * *

And said finding is supported by the evidence. *Vide* Our former Brief, Part 1, pages 222 to 237.

Now, as the waters which came to the swamp —be they little or much, casual or usual—spread from side to side thereof before going through it, mattered not to plaintiffs what channels, gullies or depressions there were within the swamp, or where or how the "thread of the stream" twisted or turned. The swamp itself being the bed, and the Government the owner of the *ripae*, it was immaterial where or upon which side the deeper lines of depression could be found. Riparian rights depend solely upon the ownership of the banks, not the bed of the stream.

"The mere ownership of the soil over which water flows gives no special or beneficial interest in the wa-

ter. It is rather the ownership of the banks on either side of the stream that creates and upholds the right."

Wood on Nuisances, Sec. 345.

In *Hoehl* vs. *The City*, 57 Iowa, 454, the Court say:

"The stream in question meanders through the city of Mosqueton; * * it is not made the general boundary of property situated upon its sides, but the town plat is laid out without any reference to it. In some places lots extend far into the stream; in others they are situated almost wholly within it; and in other places the bed of the stream occupies almost the entire width of a street. It is evident that no lot owner bordering upon the edge of the stream could have a qualified property in the soil to the thread of the stream; for each lot would always be bounded by another lot or by the edge of the street. *It seems that the doctrine of riparian proprietorship cannot be applicable to property thus situated.*"

C.

The ruling of the Court below rejecting their offer in rebuttal, did not prejudice plaintiffs, for the further reasons:

1st. The Common Law doctrine of riparian rights, whereby a proprietor of land bordering upon a running stream is presumed to have a right to the full, free and uninterrupted flow of the waters of such stream, is not and never has been the law of this State.

2d. Whether or not such doctrine of riparian rights prevails as to other lands, it certainly has no applicability to that class of lands generally denominated Swamp and Overflowed Lands.

3d. Whether applicable or not to lands granted by the State prior to May 1st, 1872, at which date Sections 1410 to 1422 of the Civil Code went into effect, this doctrine of riparian rights is not applicable to any lands owned by the State subsequent to that date.

4th. Whatever may be the applicability of the doctrine of riparian rights elsewhere within the State, it is not applicable to lands within Kern County, for the Legislature has enacted different principles and declared a different policy relative to water-rights in that county and the counties from which it was formed, radically antagonistic and diametrically opposed to those of the Common Law, and which, if not in express words, by necessary implication at least, operated as a repeal of the Common Law doctrine of riparian rights.

Vide—

Statutes 1854, p. 76.
Statutes 1860, p. 335.
Statutes 1862, p. 235.
Statutes 1863–4, p. 375.
Statutes 1865–6, p. 796.
Statutes 1875–6, p. 547.

5th. Defendant's diversion of a portion of the waters of Kern River into the Calloway Canal being itself lawful and in conformity with the provisions of the Statute, constituted no nuisance of which plaintiffs could complain or which a Court of Equity would enjoin.

6th. The construction of the Kern Valley Water Company's Canals and Levees, whereby, with the license and consent of plaintiffs, all waters which otherwise might have reached plaintiffs lands, were intercepted and diverted therefrom, deprived plaintiffs of the right to complain of our taking, using, or even consuming the waters which, by reason of such obstructions, could not possibly have reached them. Unless plaintiffs were in a position to use the water or at least to have it flow to them, they could not be heard to complain of our diversion.

Nevada Co., etc., vs. *Kidd*, 37 Cal., 307.

7th. Plaintiffs were guilty of such laches in prosecuting whatever rights they may have had, that no condition of their slough or water-course can now justify them in asserting so stale a claim.

As these several points have been elaborately argued in the briefs of other counsel for respondent, filed on this present hearing, or will be hereinafter more fully touched upon, under the other questions suggested, we refer your Honors to said briefs and to the discussions hereinafter contained.

QUESTION TWO.

DID THE COURT ERR IN SUSTAINING DEFENDANT'S OBJECTIONS TO THE INTRODUCTION BY THE PLAINTIFFS OF THE CERTIFICATES OF SALE BY THE STATE OF THE LANDS CLAIMED BY PLAINTIFFS?

We contend:

1st. The Court did not err.

2d. The error, if any, was immaterial, and did not injure or prejudice plaintiffs.

FIRST.

THE COURT DID NOT ERR.

A.

In their amended complaint plaintiffs allege that the lands, by reason of which they claim riparian rights, "belonged to the State of California until the year 1876, and later." In its answer, defendant admits, and itself alleges "that said lands belonged to the State until the year 1876, and later." The answer denies other allegations set forth in plaintiffs' complaint, and raises issues of fact thereon; but this one particular allegation of ownership in the State it expressly admits and

accepts. Such tender by plaintiffs and admission by defendant fixes the fact, and the trial of all other issues joined, must be had with reference to such established fact. It was no more competent for plaintiffs to introduce evidence that the lands in question did not belong to the State at the time alleged but had long prior thereto been granted to plaintiffs, than it was for defendant to go back on its direct admission, and show that said lands never did at any time belong to the State—plaintiffs' grantor.

One of the fundamental principles and purposes of all pleadings is to narrow the issues involved to some one or more salient points; and when one of several issues tendered is not accepted, the trial thereof must be had in view of each other fact alleged and accepted, as though such accepted facts had actually been proved and found. It is a universal rule of pleading and practice that evidence on the facts in issue, and upon those alone, can be introduced. Now, plaintiffs set forth a certain fact from which they deduce a certain conclusion of law. Defendant admitted the fact, but denied the conclusion deduced. Either party had an absolute right to rely upon the fact admitted as an established part of his case, and neither party could be permitted, either directly or in rebuttal, to disprove such fact, unless by permission of the Court for *good cause had.* These principles are

not mere theories of law, wieldable at pleasure, but matters of absolute, fixed right upon which parties litigant are entitled to rely.

Now, plaintiffs neither showed nor attempted to show any cause whatsoever why, after having closed their case and defendant's evidence being in, they should be permitted to introduce their certificates of purchase. They were expressly asked the object of their offer and they replied "to show when their equity in their lands commenced and as rebuttal to the appropriation of the Calloway." (Trans. 5, fols. 256 to 258.)

The offer was properly rejected, for the pleadings had fixed the inception of their rights. Their allegation that the lands belonged to the State up to 1876, accepted by defendant, precluded them from showing any earlier title, legal or equitable.

As rebuttal to the appropriation to the Calloway the evidence was clearly inadmissible, for that fact could only be rebutted by disproof, direct or indirect, of the appropriation itself.

B.

Plaintiffs having pleaded that the lands belonged to the State until the year 1876 must be held to have framed their complaint with special reference to the then existing law, whatever that law

may have been. If the Common Law doctrine of riparian rights was the law of the State at that time, then by that law must their pleadings be interpreted, and the facts alleged construed. If, on the contrary, the riparian doctrine was not the law then in force, it was necessary for plaintiffs to set forth the why and the wherefore of their particular claim to the flow of the water, and to specify specific facts calling forth the application of other principles than those of the then existing general law.

Plaintiffs allege that they are the owners of certain lands situated upon a water-course. Under the Common Law doctrine of riparian rights these allegations import with them the right to have the water flow as it has been wont to flow. Abolish that Common Law doctrine and they carry no such import.

If the law be that to all land acquired from the State prior to a given date, riparian rights shall be appurtenant, but not to land acquired subsequent to that date, it becomes incumbent upon him who seeks to assert such rights to set forth and show whether the land was acquired before or after the date specified. To that extent and for that purpose time becomes a material and essential allegation; for, to the title acquired before the given date, the law ascribes riparian rights, whilst to that acquired after,

nothing. When the exercise of a right is dependent upon the acquisition of title before a certain event, time as to that event is necessarily material, and any variance between the allegation and the proof will be fatal.

Now, in the cases before your Honors, if the riparian doctrine has never prevailed within this State—and we contend it never has—of course plaintiffs have set forth no cause of action, and all discussion as to the rulings of the Court below are useless. But assume, for the purposes of this argument, that prior to the adoption of our Civil Code the Common Law doctrine of riparian rights was the law in force. It then becomes necessary to consider the effect of the Code upon that law. Under such assumption we contend that by the Code the general law of water rights was changed and the English Common Law doctrine repudiated.

By Section 4 of the Civil Code it is provided that:

"The rule of the Common Law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed, with the view to effect its objects and to promote justice."

Turning now to Section 1410, same Code, we find that:

"The right to the use of running water flowing in a river or stream, or down a cañon or ravine may be acquired by appropriation."

Here we have the promulgation of a general law declaring the doctrine of appropriation to be the law of the land; not a mere legislating, as Mr. McAllister contended it was, relative to the public, or government lands, but the announcement of a general principle which is to prevail throughout, applicable alike to all lands whether held in public or in private ownership.

Section 1422, however, provides that:

"The rights of riparian proprietors are not affected by the provisions of this title."

Now, various interpretations have been suggested of this proviso or saving clause to the Code. It has even been contended by appellants that the clause itself operates to preserve as law, the principles of the Common Law doctrine of riparian rights. A moment's consideration, however, will convince your Honors that such contention is not tenable, and that the only purpose or effect of Section 1422 is the saving of vested rights.

The words "rights of riparian proprietors" are used either in a generic sense, meaning that class of rights, that principle of law known generally as the doctrine of riparian rights; or else they are used in the more limited sense of private rights of

individuals, people who own lands on the banks of streams.

That these words cannot have been used in the more enlarged sense, is too self-evident for serious question. Give them that interpretation and you have in the same Title of the Code, in the same statutory enactment, a declaration of two diametrically opposite and antagonistic principles—the doctrine of appropriation and the doctrine of riparian rights. The two cannot coëxist. To so construe Section 1422 would render the statute nugatory and void.

On the other hand, giving to them the other and more restricted construction, each and all parts of the statute harmonize one with another and the provisions of Section 4 are respected.

So construing these Sections 1410 and 1422 of the Civil Code we have, then, a declaration or promulgation of the general law of appropriation of water applicable alike to all lands, State, public, or private, with the sole proviso that those individuals who, at the time of the enactment, were possessed of lands upon the banks of streams should be protected and maintained in whatever rights they then had.

Now, counsel for appellants have contended that, though the doctrine of appropriation may, since the adoption of the Code, be applicable when the appropriation is made whilst the title to

the land is still in the State, it cannot apply when the State has parted with its title, even after the adoption of the Code, before the appropriation is made. In such contention, however, counsel are clearly wrong, for the law of the State being that of appropriation, its grant of the land carries with it no right to the water. Such right can only be derived from some existing law and the Code having abrogated or repealed the law of riparian rights (except, as before stated, to the extent of preserving those then existing rights) there is no law under which a right to the water as part and portion to the title granted can arise.

Applying this reasoning to the cases at hand, plaintiffs' allegations, not only failed to show peculiar facts or circumstances taking their case out of the application of the general law, but by their statement that the lands belonged to the State until the year 1876, expressly show that they cannot claim the benefit of the older law which, as to them, has been repealed. The allegation that the lands belonged to the State until 1876 was material, if in nothing else, in that it showed that plaintiffs having acquired their lands subsequent to May 1, 1872, the date upon which Sections 1410 to 1422 went into effect, acquired them under the law of appropriation and not under that of riparian rights. Not only does this alle-

gation of theirs strike to the very heart of their case, and show that they have no cause of action, but it also conclusively shows that the Court below committed no error in rejecting their certificates offered in rebuttal.

These certificates were offered for one of two purposes. Either they were offered to antedate defendants' appropriation, as stated by Mr. McAllister during the trial below—we quote from the record :

"Mr. Houghton—We offer in evidence a certified copy of a certificate of purchase from the State Land Office, dated the 30th day of September, 1872. * * * This is a portion of the land in the complaint described, and in the patents which we offered in evidence.

Mr. Haggin—What is the object of this?

Mr. McAllisrter—To show the time that our grantors first became interested in this land, showing when our equity in this land commenced. To show when our inchoate right or equity originated, we want to prove whatever title this certificate gave; and it is rebuttal to the appropriation of the Calloway. They put forward that title and we answer it by these certificates. We propose to show the issuance of the certificates to certain parties and the assignments from those parties to the plaintiffs, and then the issuance of the patents in pursuance of these certificates. We seek to show that we acquired an inchoate interest in these lands at the date of these certificates and the point of time we became interested in these lands.

Defendants object on the ground that it is irrelevant, immaterial, incompetent and not proper testimony in rebuttal.

THE COURT—If it is simply offered as rebutting testimony, I shall have to sustain the objection.

The plaintiffs except."

Trans. 5, fol. 256 to 258.

—or they were offered, as he afterwards discovered whilst arguing before your Honors, "for the purpose of showing that these lands were not liable to appropriation."

Under either aspect the offer was properly rejected, for:

If issued subsequent to May 1st, 1872, they vested in plaintiffs no riparian rights, and it therefore mattered not whether they were prior or subsequent to our appropriation, as in neither event could they defeat that appropriation; and if issued prior to May 1st, 1872, they were irrelevant, immaterlal and incompetent under their own allegations, not rebuttal to anything proved by defendant, but simply and purely a contradiction of the case made out in their pleadings.

If, as said by Mr. McAllister on oral argument, the purpose of these certificates was not to show a right or title in plaintiffs, but merely to defeat defendants' appropriation by showing that the State having parted with the land to some third person prior to the enactment of the Code, and that therefore the waters appropriated by defendant were not open to appropriation, the offer was still inadmissible, for the further reason that

such showing could not better plaintiffs' case. They must succeed or fail on their own title, not on any defect in ours.

Mr. McAllister asks: "Why, if our objection was that the certificates were not admissible under the pleadings, did we not so state on the trial and give them an opportunity to amend?" Our objection was full and explicit, and covered every possible ground:

> "Defendants object on the ground that it is irrelevant, immaterial, incompetent, and not proper testimony in rebuttal."
>
> Trans. 5, fol. 458.

Besides, in making our objection, it was expressly urged upon the particular ground amongst others, that their proposed testimony was contradictory of their own pleadings and inadmissible thereunder.

Here we desire to call your Honor's attention to the fact, conspicuous from the pleadings, that this very allegation of plaintiffs which they say they would have amended had our objection been pointed thereto, was evidently framed with great care, and because of and in reliance upon the theory which they afterwards urged upon your Honors, that the doctrine of appropriation could only apply to Government lands and not to those held or owned by the State. That this is

so, is evidenced by the fact that the original complaint drafted by other attorneys contained no such allegation as that "That the lands belonged to the State until the year 1876," but, on the contrary, set forth one radically different, to-wit: "That plaintiffs, their predecessors and grantors, have been the owners, seized and possessed of said lands as aforesaid, for more than eight years continuously next preceding the commencement of this action." (Trans. 1, fol. 15.)

In the amended complaint, subscribed by Messrs. McAllister & Bergin, of counsel for plaintiffs, the eight year ownership clause of the original complaint is carefully omitted, and in its stead is inserted the deliberate statement, sworn to by Charles Lux, that the lands did belong to the State until 1876.

In his oral argument one of plaintiffs' counsel made a strong appeal to your Honors not to decide this case against his clients, lest the so doing might be deemed a reflection upon his own legal acumen. With all due respect to counsel personally, and keenest appreciation of his very superior ability, we most humbly suggest that your Honors decide the case according to the law involved, and not out of mere deference to his delicacy of sentiment or personal feelings.

C.

Plaintiffs deraign title from the State of California under the Swamp and Overflowed Land Laws, to wit: the Act of March 28th, 1868, Statutes of 1867–8, page 507, and Title VIII, Part 3, of the Political Code.

We submit that under the laws providing for the sale of these lands, the riparian rights claimed by plaintiffs never passed with the lands themselves, but being in their very nature inconsistent with and repugnant to the policy and purposes of the State in disposing of such lands, were necessarily excepted from the grant thereof. If so, then of course plaintiffs' certificates of purchase could have given no greater rights than their patents conveyed, and were therefore properly rejected.

When plaintiffs or their grantors took their lands from the State, they must be held to have taken them with full knowledge of and acquiescence in both the particular law under which they purchased, and also the general policy of the State respecting their reclamation.

Kimball vs. *Reclamation Commissioners*, 45 Cal., 357.

Whatever may have been the purpose of Congress in bestowing these lands upon the State, the

State itself has so evinced its desire and intention to reclaim them that nothing which might now operate as a hindrance or impediment to such reclamation, can be deemed to have been contemplated by the State or embraced within its grant. The State not only authorizes and directs the reclamation of these lands, but holds out large inducements, to the extent even of giving the land to the certificate holder who will effect a speedy severance of the water, which theretofore has been wont to flow upon it, from the land over which it squanders itself.

By both the Act of 1868 and the Political Code it is provided that whenever the holders of title to one-half or more of *any body* of swamp and overflowed lands susceptible of one mode of reclamation desire to reclaim the same, they may do so according to such plans as they may adopt and submit to the Board of Supervisors.

Now, this provision of the law under which the swamp land owner acquires title, absolutely annihilates the doctrine of riparian rights. It not only provides that the owners of a mere majority of acreage in any one body of swamp land may sever the so-called easement from the land and deprive the minority owners, *nolens volens*, of all flow, use or benefit of the waters which had theretofore been accustomed to reach them, but it authorizes others, not within the same body of land

or having any connection therewith, to do the same.

For instance, take the very patent case presented to us in Kern County. Look on the map (*e. g.* Plaintiffs' Map No. 4) and you will find two separate and distinct bodies of swamp land, each taken up and held under the Swamp Land Acts—the one tract embracing Kern and Buena Vista Lakes, the other Buena Vista Swamp—separated from one another by some six miles or more of upper or Government land.

Now the land owners in the Kern and Buena Vista Lakes tract may divert the waters from their lands, when and as they see fit. They may, if deemed expedient, go to the head of the Calloway Canal and there intercept the waters of the river and turn them off towards Tulare Lake, away from the lands in Buena Vista Swamp; yet the land owners in Buena Vista Swamp cannot complain, for they hold their own lands under the same title and know that they are ever subject to both voluntary and involuntary reclamation and liable at any moment to be deprived of all water by some reclamation scheme above.

Now, if the one swamp land owner cannot complain of this diversion by another swamp land owner, upon what principle of law or equity can he complain of the same thing when done by a third party? If his right to have the water

there be not in itself an absolute right against all the world, what is there in the right to permit of its assertion against one person but not against another? Certainly the diversion above is not the exercise of any riparian right common to all proprietors along the stream. If his right be the riparian right it exists solely by reason of a policy of the law which inseparably attaches the water to the land. But if that policy directs or permits a severing of the water from the land, it can make no difference by whom the severance is done. The absolute right to have it there being no longer a part of the land, the obstruction or diversion above, by whoever done, creates no injury, infringes no right.

If, however, the swamp land owner has actually appropriated the water to a beneficial use, then of course other principles come in and protect him in his appropriation.

D

Plaintiffs' certificates of purchase were properly rejected for the reason that in their opening case, plaintiffs did not confine themselves to their patents of 1876 and later; but being apprised by defendant's answer that its appropriation was in 1875, they expressly went into evidence of an earlier

title, and attempted to prove both seizin and possession as far back as 1870 or earlier. They introduced a deed from Thos. Baker and others to Henry Miller and Chas. Lux, purporting to convey the greater portion, if not all the lands in question, to the grantees therein named. (Trans. 2, fol. 75, *et seq.*) They also sought to prove by their witnesses an actual possession dating back at least to the time of said deed. They attempted to show by Crocker that he took possession in 1870 (Trans. 2, fol. 2383); that in 1870, they bought the land and immediately thereafter, rigged up pumps and went to pumping (Trans. 2, fol. 714); they attempted to prove a possession in plaintiffs by the testimony of Epperly to the effect that in 1871, he rented land from Crocker (Trans. 2, fol. 2253); and, generally, they attempted to prove a possession by showing that plaintiffs ran their cattle upon the lands in question as early as 1868.

Having gone into this proof of an earlier title, it was incumbent upon them to make out their whole case thereon, and not permissible for them to introduce a part in their opening and reserve the balance to cumulate against us in rebuttal.

SECOND.

THE ERROR, IF ANY, WAS IMMATERIAL, AND DID NOT INJURE OR PREJUDICE PLAINTIFFS.

1st. There being no water-course within the swamp (*Vide* Findings cited *ante* page 67, *et seq.*) it was immaterial what titles plaintiffs had or when or how they acquired them; it was also immaterial whether our appropriation of water was valid or not.

2d. The construction of the Kern Valley Water Company's canals and levees, whereby, with plaintiffs' license and consent, all waters which otherwise might have reached their lands, were intercepted and diverted therefrom, deprived plaintiffs of the right to complain of a diversion which in no manner affected them. It was therefore immaterial what title they had if the right to the flow of water had been lost to them by abandonment or assignment to others.

3d. Plaintiffs were guilty of such laches in prosecuting whatever rights they may have had, that no proof of title, however early, could justify their assertion of so stale a claim.

QUESTION THREE.

ARE ALL THE FACTS FOUND IN FINDINGS 63, 64, 67, 68 AND 69, OR IN ANY OF THEM, SUFFICIENT TO JUSTIFY THE DENIAL OF THE EQUITABLE RELIEF PRAYED BY PLAINTIFFS.

This question embraces two separate and distinct propositions.

First—That of plaintiffs' laches and inequitable delay in asserting whatever rights they may have had to the waters of Kern River; and,

Second—That by their acquiescence in the construction and maintenance of the Kern Valley Water Company's Canals and Levees, plaintiffs have so renounced, abandoned or otherwise parted with whatever right they may have had to the flow of the waters of Kern River, as to now preclude them from asserting those rights as against this defendant in a Court of Equity.

Upon these two propositions we beg particularly to call your Honors' special attention to that portion of Respondent's former Brief marked "F", being Part 2, pages 144 to 186, wherein this proposition of laches is fully discussed and supported by numerous authorities:

Also to that portion of the argument of Judge Stanly, filed on behalf of Respondent on the present hearing, pages 182 to 208:

And to the Brief of Messrs. Flournoy, Mhoon and Flournoy, of counsel for Respondent, pages 78 to 99 and 103 to 115.

Respectfully submitted,

LOUIS T. HAGGIN,
Attorney for Respondent.

Service of the within, by copy
admitted this 25th day of May 1885
Stetson & Boughton &
Attorneys for Appellants